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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

A. B. PITTMAN, Trustee, National Cottonseed Products Corporation, Bankrupt,
Petitioner,

vs.

UNION PLANTERS NATIONAL BANK AND TRUST COMPANY, ET AL.,
Respondents.

No. 118

PETITION OF A. B. PITTMAN, TRUSTEE, NATIONAL COTTONSEED PRODUCTS CORPORATION, BANKRUPT, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

LOWELL W. TAYLOR,
LARRY CRESON,
Attys. for Petitioner.

TABLE OF CONTENTS

Pages

PETITION OF A. B. PITTMAN, TRUSTEE, NATIONAL COTTONSEED PRODUCTS CORPORATION, BANKRUPT, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT 1-11

Summary Statement of the Matter Involved 1-2

Proceedings in District Court, Pleadings and Issues 2-8

Reasons Relied on for Allowance of The Writ 8-10

Prayer for Writ 11

BRIEF AND ARGUMENT IN SUPPORT OF PETITION 13-46

Jurisdiction 14

Question Presented for Review 14-24

ASSIGNMENT OF ERRORS 24-25

POINTS OF LAW 25-32

ARGUMENT 33-46

TABLE OF AUTHORITIES

Table of Cases

Pages

American Can Co. v. Erie Preserving Co. (D. C.) 171 Fed. 540 (1909) 9, 26, 27, 28, 30, 39

Bank v. Ebbert & Co. (Tenn.), 9 Heiskell 153 (1872) 30, 32

Bank of Rome v. Hazelton, 83 Tenn. 216 (1885) 25, 26

Benedict v. Ratner, 268 U. S. 353, 45 S. Ct. 566 (1925) 8, 40

Coats, Bennett & Reidenbach, Re (C. C. A. 2d), 12 Fed. (2d) 497 (1926) 9, 28, 29

Collinwood Motor Sales Co., Re (C. C. A. 6th), 72 Fed. (2d) 137 (1934) 32, 40

Fleming v. Noble (C. C. A. 1st), 250 Fed. 733 (1918) 34

Fourth State Nat'l Bank v. Milbourne Mill Co's. Trustee (C. C. A. 3rd), 172 Fed. 177 (1909) 9, 27, 30, 39

General Motors Acceptance Corp. v. Green County Union Bank (Tenn.), 95 S. W. (2d) 948 (1936) 32

Hamilton Ridge Lumber Sales Corp. v. Wilson (C. C. A. 4th), 25 Fed. (2d) 592 (1928) 39

Hyman v. Semmes (C. C. A. 6th), 26 Fed. (2d) 10 (1928) 29, 39

Interstate Banking Co. v. Brown (C. C. A. 6th), 235 Fed. 32 (1916) 30, 31

Love v. Export Storage Co. (C. C. A. 6th), 143 Fed. 1 (1906) 26, 27, 28

Manufacturing Co. v. Nordeman, 118 Tenn. 384 (1906) 32

TABLE OF AUTHORITIES—Continued

Pages

Maryland Casualty Co. v. Washington L. & B. Co. (Ga.), 145 S. E. 761, 61 A. L. R. 323 (1928) 27

McGaffey Canning Co. v. Bank of America, 294 Pac. 45, 109 Cal. App. 415 ..... 27, 28, 39

Morgan Bros. v. Dayton Coal & Iron Co., 134 Tenn. 228 (1915) 32, 41

Ommen v. Tolcott (C. C. A. 2d), 188 Fed. 401 (1911) 29

Pittman, Trustee, v. Union Planters Nat'l Bk. & Tr. Co., et al, (C. C. A. 6th), 118 Fed. (2d) 211 ..... 9, 14, 43

Rogers, In Re (C. C. A. 7th), 125 Fed. 169 (1903) 9, 27, 28, 39

Security Warehousing Co. v. Hand, 206 U. S. 415, 27 S. Ct. 720, 51 L. Ed. 1117 (1907) 4, 8, 9, 26, 35, 37-39

Security Warehousing Co. v. Hand (C. C. A. 7th), 143 Fed. 32 (1906) 26, 27, 28, 29, 35-37

Spanish-American Cork Products Co., Re (C. C. A. 4th), 2 Fed. (2d) 203 ..... 9, 27, 28, 29, 39

Union Trust Co. v. Wilson, 198 U. S. 530, 25 S. Ct. 766, 49 L. Ed. 1154 (1905) 25, 26, 45

Williams v. First National Bank, 150 Tenn. 15, 261 S. W. 973 (1924) 8, 28, 39, 40

TABLE OF TEXTS

Bankruptcy Act, Sec. 67, 11 U.S.C.A., Sec. 107 8

67 Corpus Juris 486, Sec. 36 ..... 26, 27

Negotiable Warehouse Receipts Act, Williams Tennessee Code, Sec. 7587 ..... 27, 43

Uniform Laws Annotated, Vol. 3, p. 83 27

Uniform Warehouse Receipts Act, Sec. 2 (Adopted in Ill., Ark., Tenn. and Texas) 31

Uniform Warehouse Receipts Act, Sec. 50 (Adopted in Ill., Ark., Tenn. and Texas) 26

U.S.C.A. Title 28, Sec. 347 12

Williams Tenn. Code, Vol. 5, Sec. 7533-a 31, 42

Williams Tenn. Code (1932), Sec. 7544 43-44

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PETITION OF A. B. PITTMAN, TRUSTEE, NATIONAL COTTONSEED PRODUCTS CORPORATION, BANKRUPT, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, A. B. Pittman, Trustee, National Cottonseed Products Corporation, Bankrupt, respectfully submits his petition for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Sixth Circuit in the above entitled case, entered March 4, 1941.

Summary Statement of The Matter Involved.

The question here presented arises out of a decree of the District Court awarding to three banks, creditors of the Bankrupt, and named as respondents here, the sum

of $1,335,980.22. The fund awarded to the banks represented the proceeds of substantially all of the Bankrupt's assets, except physical properties securing a first mortgage far in excess of their value, and $143,000.00, being the proceeds derived from the sale of the Bankrupt's cottonseed products inventory.

Proceedings in District Court.

Pleadings and Issues.

The bankrupt filed a petition on January 23, 1935, ostensibly for the purpose of seeking the benefit of the provisions of Section 77-b of the Bankruptcy Act. The petition averred that the bankrupt's business was substantially that of milling and crushing cottonseed and manufacturing products necessarily and customarily resulting from such an operation; that all of the bankrupt's physical properties were mortgaged to secure outstanding bonds in the amount of $1,216,500.00; that substantially all of its remaining assets, consisting of cottonseed and cottonseed products, notes receivable and accounts receivable, were pledged to the creditor banks; that it had a comparatively small amount of free assets "of no substantial value"; and the petition reiterated that the bankrupt was "without any prospect" of being able to pay past due interest on its mortgage debt and the large indebtedness to unsecured creditors (Vol. 1, pps. 11-16). On the same day an order was entered approving the petition and appointing temporary trustees (Vol. 1, p. 24). The cause was referred to the Master on March 18, 1935, and all creditors were required to file their claims with him (Vol. 1, p. 34). It being apparent that because of the debtor's hopelessly insolvent condition, no reorganization could be effected, an order was entered on April 11, 1935, adjudicating that the bank-

rupt was insolvent; that the appraised value of the mortgaged properties was $707,500.00; that the bonds secured by the mortgage amounted to the sum of $1,216,500.00, with unpaid interest from July 1, 1934; that a plan, theretofore submitted and filed, which contemplated the transfer of the mortgaged properties to a corporation for the benefit of bondholders be submitted to bondholders; that the Trustee proceed with liquidation of all other assets as an ordinary bankruptcy case (Vol. 1, pps. 37-41). The bondholders were awarded a deficiency judgment of $509,000.00 (Vol. 2, p. 410).

The respondent banks filed claims in the bankruptcy proceeding, asserting liens on the Bankrupt's cottonseed inventory and its cottonseed products inventory, and to proceeds derived therefrom, by virtue of so-called field warehouse receipts and trust receipts. (Rec. V. 1, p. 42-68.) Petitioner filed objections to the banks' claims, asserting that the banks were not entitled to any lien upon the cottonseed, because the so-called field warehouse receipts and other instruments through which they claimed a lien were void under state law, and were not, therefore, enforcible in bankruptcy (Rec. V. 1, pps. 70-73, 79-81, 92-96).

The Trustee petitioner's insistence was and is that these receipts did not vest in the banks any lien, because the Bankrupt retained possession and control of the cottonseed and products inventory, and at no time did the banks or the field warehouseman take any actual, open and exclusive possession. The constantly changing mass of seed was left on the premises at the manufacturing plants of the Bankrupt. In addition there was a written agreement, by the terms of which the Bankrupt was to consume the inventory in its processing operations, and market the by-products

derived therefrom, and repay the banks out of funds derived from the normal operation of its business. Petitioner insisted that the field warehousing agreement existed only on paper, and was only intended to afford the banks an unrecorded secret lien; that while the receipts used were negotiable in form and contained all of the elements prescribed by the statutes, they vested no right in the holders, because they did not describe any specific property, but simply called for specific quantities out of a fluctuating whole; and further, because by express agreement and understanding between the banks, the Bankrupt and the warehouseman, the receipts were not intended to cover cottonseed at the locations stated in the receipts, but attempted to indiscriminately pass title to the products or seed at any one of ten mills located in eight cities, and four States.

The cause having been referred to a special master, he was directed to take proof and report findings of fact and conclusions of law on the issues made by the banks' claims and the Trustee's objections thereto. The Master took several thousand pages of testimony and filed a complete report, in which he made specific findings of evidentiary facts and separate conclusions. (Rec. V. 2, pp. 349-357, 360-361, 364, and 368-370.) After finding every fact essential to establish the invalidity of the lien under the State law, and under the holding of this Honorable Court in Security Warehousing Company v. Hand, 206 U. S. 415, 27 S. Ct. 720, 51 L. Ed. 1117, as petitioner sees it, the Master reached the conclusion that despite those facts, the receipts on seed were valid, and vested a lien in the banks enforcible in bankruptcy. (Rec. V. 2, p. 368-370.) Petitioner filed exceptions to the Master's conclusion but not to the fact findings.

The District Judge overruled the exceptions and sustained the receipts without finding any facts in conflict with the facts found and reported by the Master, and without filing any opinion expressing his reasoning. (Rec. V. 1, p. 279-280.)

Petitioner appealed to the United States Circuit Court of Appeals for the Sixth Circuit, and there assigned as error the action of the District Judge in sustaining the validity of the liens. Other holdings of the District Court were challenged, but we do not conceive that they are open for review by this Honorable Court.

The United States Circuit Court of Appeals unquestionably accepted the undisputed statement of facts found and reported by the Master, but it concurred in the holding of the lower court that on that state of facts the receipts were valid.

At the instance and request of the Trustee the Master reported in detail the Evidentiary Facts, going to the very heart of this question (Vol. 2, pps. 349-357, 360-361 & 364). Those reported facts substantially show that the bankrupt, being insolvent and wholly without operating funds, entered into an arrangement with the banks, with whom it was closely allied and whose officers and stockholders practically owned it, whereby the banks would lend it such funds as might be necessary to carry on its actual operations and enable it to stay in business and obtain credit from others, but at the same time retain for the banks a secret lien upon every substantial item of the bankrupt's properties and assets (Vol. 2, pps. 406-411). After two local warehouse companies had declined to continue such a field warehousing system upon advice of counsel (Exhs. 77 & 96), a

deal was made with the Nashville Warehouse and Elevator Corporation of Nashville, Tennessee, which had no storage facilities in Memphis or at any other place where the bankrupt operated, substantially as follows,—a lease was executed on all the bankrupt's properties providing: a yearly rental of Ten ($10.00) Dollars and Ten (10c) Cents per ton for all seed warehoused; sole and exclusive possession by the warehouse company; an absolute segregation of the warehoused property; the appointment of a custodian at each mill; a fidelity bond on each custodian; and the issuance of warehouse receipts by an employee of the warehouse company from the head office of the bankrupt, those receipts to be pledged with the banks (Vol. 2, pps. 349-350). That was the arrangement as it existed on paper, but the undisputed proof showed and the Master reported that no rent was ever paid, the leases were not recorded any place, no walls, barriers, or partitions were ever erected, and the bankrupt's employees continued to use the premises and handle the seed and products exactly as before. Employees of the bankrupt were appointed custodians and the bankrupt continued to pay their salaries and they continued to work for the bankrupt exactly as before, except that each day the custodians would take from the bankrupt's records a notation of quantities on hand and send this in a report to a representative of the warehouse company stationed in the bankrupt's head office (Vol. 2, p. 350). The undisputed proof was and the Master reported that the bankrupt paid every expense in connection with the warehousing arrangement and the warehouse company required a signed agreement relieving it of every duty of a warehouseman (Vol. 2, p. 351 & Exh. 33 & 325).

During the entire period in question, the cottonseed inventory was in the bankrupt's seed houses, handled exclusively by the bankrupt's employees, constituted the bankrupt's inventory, and it was contemplated by the banks, the bankrupt and the so-called field warehousemen, that the cottonseed should be consumed by crushing and the products exhausted by sale (Vol. 2, pps. 351-352 & 364). From those facts it inescapably follows that the so-called warehousemen did not have the actual, open and exclusive possession of the cottonseed inexorably required by law to sustain this character of lien. After finding the above facts in favor of the Trustee, the Master however recommended that the banks' claims to a lien on cottonseed by virtue of the warehouse receipts be sustained because the bankrupt and the field warehousemen went through a lot of forms. These forms were emptied of significance by contrary intention and action of the parties. The bankrupt's seed inventory was sold for $1,335,980.22, and the entire amount was awarded to the banks. It was held that the pledge of the field warehouse receipts gave the banks a lien on the cottonseed inventory to the exclusion of all other creditors.

The Master, the District Judge and the United States Circuit Court of Appeals, all held that the warehouse receipts covering the Bankrupt's products inventory were fraudulent in law and void, and insufficient to create a lien valid under State law. The warehousing arrangement and the receipts on products were substantially identical with the warehousing arrangement and receipts on cottonseed, except that the Master found that the signs on the products houses were insufficient to meet the requirements of the law. Insofar as the possession required by law is concerned, there was no difference in the warehousing of either seed or products.

The question desired to be presented to this Honorable Court for decision is whether the District Court and the United States Circuit Court of Appeals arrived at the correct conclusions with respect to the undisputed facts found and reported by the Master, to which neither side filed exceptions. It is petitioner's insistence that those facts conclusively establish the invalidity of the alleged lien under the controlling State law, and that the decisions of the lower courts are in direct conflict with the opinion of this Honorable Court in the last reported decision on the question. (Security Warehousing Company v. Hand, 206 U. S. 415, 27 S. Ct. 720, L. Ed. 1117.)

Reasons Relied On for Allowance of The Writ.

The only liens sustainable in bankruptcy against the Trustee in Bankruptcy, are those valid under State law. (Bankruptcy Act, Sec. 67, 11 U.S.C.A. Sec. 107; Benedict v. Ratner, 268 U. S. 353, 45 S. Ct. 566 (1925), 69 L. Ed. 991.)

The decision of the United States Circuit Court of Appeals in this case, when applied to the undisputed facts found and reported by the Master, is in conflict with the uniform decisions of the Supreme Court of Tennessee. (Williams v. First National Bank, 150 Tenn. 15, 261 S. W. 973, and cases therein cited.)

The United States Circuit Court of Appeals has held in this case that the taking of leases, appointment of the Bankrupt's employees as custodians, and the other forms gone through, give validity to the liens, although the undisputed facts reported by the Master, and to which neither side filed exceptions, establish to our minds that neither the warehouseman nor the creditor banks ever had actual,

open and exclusive possession of the cottonseed. In addition there was a written agreement, by the terms of which the debtor was to consume the entire seed inventory by crushing and exhaust the products by sale in the ordinary course of business. The holding is in conflict with the last reported opinion of this Honorable Court, where it was held that an identical arrangement was void under State law the same in principle as the Tennessee law. (Security Warehousing Company v. Hand, 206 U. S. 415, 27 S. Ct. 720, 51 L. Ed. 1117.) This Honorable Court there held that such an arrangement as the lower court has sustained in this case was nothing more than a pretense and a sham, and wholly inadequate to sustain the lien.

It will appear from a large number of decisions by the various United States Circuit Courts of Appeal that the application of the principles announced by this Honorable Court in the Hand case have in some instances seemingly been disregarded, in others the decision has been passed up by mere reference to it without applying the holding there announced, while in the majority it has been followed. The various applications of the rule there announced have resulted in uncertainty and conflicts in the various Circuits, and the decision in this case has resulted in a conflict between the Sixth Circuit and other Circuits, namely, the Second, Third, Fourth and Seventh Circuits. (Pittman, Trustee, v. Union Planters National Bank and Trust Company, et al., C.C.A. 6th, 118 Fed. (2d) 211; Re: Coats, Bennett & Reidenbach, C.C.A. 2d, 12 Fed. (2d) 497; Fourth State Nat'l Bank v. Milboune Mill Co.'s Trustee, C.C.A. 3rd, 172 Fed. 177; Re: Spanish-American Cork Products Co., C.C.A. 4th, 2 Fed. (2d) 203; In Re: Rogers, C.C.A. 7th, 125 Fed. 169; American Can Co. v. Erie Preserving Co. (D.C.), 171 Fed. 540, C.C.A. 7th, 183 Fed. 96.)

In the cases relied on the courts were dealing with State law like the Tennessee law and applying it in bankruptcy cases. It is submitted that the widespread and rapidly increasing use of various schemes and devices to circumvent the rule against secret liens and the laxity of the various courts in enforcing that rule, requires a restatement of its position by this Honorable Court, in order that there may be more certainly with respect to the status of such schemes and devices in bankruptcy.

The United States Circuit Court of Appeals, in its opinion, has construed the Uniform Negotiable Receipts Act, as adopted in Tennessee, to mean that the provisions required by that act to be contained in the receipt, and especially, statement of the location of the goods stored, may be vitally altered by oral and secret agreement between the receipt holder and the warehouseman, in complete disregard of the rights of creditors or a trustee in bankruptcy of the depositor. This act is in force in many States, and its construction is, therefore, a matter of broad general importance, especially in the administration of the Bankruptcy Act in the Federal Courts. Especially is the decision sought to be reviewed here replete with potential dangers, when the required statement as to location of the goods is so important an element of possession by the alleged warehouseman; and this latter question is invariably acute in the cause of so-called field warehousing. At least, it should be if the rights of creditors are given proper regard.

A certified copy of the entire record of said case in the Circuit Court of Appeals is hereby furnished and filed with this petition, in accordance with Rule 38 of this Honorable Court.

Prayer for Writ.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 8406, A. B. Pittman, Trustee, National Cottonseed Products Corporation, Bankrupt. Appellant v. Union Planters National Bank and Trust Company, et al., Appellees"; and that said judgment of said United States Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

A. B. PITTMAN, TRUSTEE, NATIONAL COTTONSEED PRODUCTS CORPORATION, BANKRUPT,

LOWELL W. TAYLOR,
LARRY CRESON,
Attys. for Petitioner.

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BRIEF AND ARGUMENT IN SUPPORT OF PETITION

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Jurisdiction.

The jurisdiction of this Honorable Court is sought under Section 240 of the Judicial Code as amended, U.S.C.A., Title 28, Sec. 347, and under Rule 38 of the rules promulgated by this Honorable Court.

The decision of the Circuit Court of Appeals in this case is reported as Pittman, Trustee, v. Union Planters National Bank and Trust Company, et al., 118 Fed. (2d) 211.

Question Presented For Review.

Were the so-called field warehouse receipts on cottonseed pledged to respondents adequate to create a lien valid under State law as against the Trustee in Bankruptcy?

The solution of the foregoing question depends upon the facts which were reported by the Master and are the basis of his conclusion, that of the District Judge, and that of the United States Circuit Court of Appeals, Sixth Circuit:

> "The National Corporation was organized and operated for the purpose of buying and crushing cottonseed and selling the products resulting from that operation, such as oil, meal, cake, hulls and linters." (Vol. 2, p. 362.)

Several years before this petition was filed the bankrupt, being without funds, arranged to carry on business and incur liabilities through the medium of a system of field warehousing. On July 9, 1931, it entered into an agreement with the Nashville Warehouse and Elevator Corporation, which company had no storage facilities in any of the

places where the bankrupt did business, the sole object and purpose of which was to issue warehouse receipts which could be used to obtain credit (Vol. 2, p. 341). The agreement provided:

> "This confirms our understanding wherein you agreed to warehouse for us for the season of 1931-1932 our cottonseed, cake and meal at the following locations:
>
> | | |
> |---|---|
> | Morrilton, Arkansas | Cairo, Illinois |
> | Little Rock, Arkansas | Dyersburg, Tennessee |
> | Pine Bluff, Arkansas | Jackson, Tennessee |
>
> 3 of our mills in Memphis, known as the Dixie, Valley and Bellevue, making a total of 9 mills.
>
> We are to lease you our storage facilities at those points under a lease to be approved by Mr. Berry, your counsel. We are to pay the expenses of the qualification of your company to do business in Arkansas and Illinois. You are to furnish the necessary employes for this purpose on as economical basis as is consistent with good business and safe warehousing, and all of those expenses are to be paid by our company monthly, and we are to pay you as your net compensation in the matter, the sum of $6,000 over and above all of the necessary expenses of said warehousing as outlined above.
>
> You are to issue warehouse receipts for cottonseed, cake and meal stored with you in the above described warehouses in a form to be approved by Mr. Berry, and in addition we agree to give you an acceptable guarantee protecting you from all loss, cost or damage in connection with the storage of cottonseed, cake and meal, excepting only loss, cost or damage resulting from your own wilful misconduct." (Exh. 325.)

Pursuant to that agreement written leases were executed on the bankrupt's premises and a form of warehouse receipt was adopted. The warehouse company appointed one

of the bankrupt's employees at each mill as custodian and required of him a fidelity bond (Vol. 2, p. 341).

They had some signs printed which the printer testified were the most difficult of any kind of type to read, and that he had never printed any such signs for advertising, etc. (Vol. 2, p. 356.)

In the fall of 1934 the warehouse company required of the bankrupt a written agreement expressly relieving the warehouse company of every duty of a warehouseman, and agreeing,—"to protect and save harmless Nashville against any loss, cost or damage arising from the storage of said cottonseed not arising out of the wilful neglect or default of Nashville." The agreement imposed upon the bankrupt the duty to inspect the seed, handle the seed, check the seed, defend all suits which might be brought against the warehouse company because it had issued those receipts, and again expressly imposed upon the bankrupt the duty to pay every expense of every kind and character incurred in connection with this field warehousing system (Vol. 2, p. 345; Exh. 33).

The foregoing represents the field warehousing system as it appeared on paper and in theory. The Master found and reported the following facts:

> "The written leases were not registered. A yearly rental of Ten ($10.00) Dollars and ten (10c) cents per ton for all seed warehoused was provided, but no rental was ever paid." (Vol. 2 ,p. 342.)*
>
> "The leases further provided that where only a portion of a building was leased then the space:
>
> 'Shall, at the sole expense of the lessor, be separated by walls, wire fences or such barriers named

*The Master consistently cited the record supporting his findings. To conserve space, we will omit his record citations when quoting.

by the lessee as effectively and conclusively set aside, indicate and designate that part of the building covered by this lease.'

Such space was never separated by the walls, fences or barriers, and this is particularly true of the Pine Bluff mill." (Vol. 2, pps. 342-343.)

"* * * no walls, barriers or partitions were ever erected and the National and its employees continued to use the premises exactly as before the warehousing arrangement was made." (Vol. 2, p. 350.)

"The duty required of each mill warehouseman was to make a written report daily of the quantities of cottonseed and products received, disposed of and remaining on hand at each mill, the figures to be ascertained from the records and reports of the National." (Vol. 2, p. 350.)

The head warehouseman stationed at the bankrupt's main office,—"complied and kept a record of the quantity of cottonseed and products on hand at each mill from the daily reports furnished him by the mill warehouseman, issued and cancelled warehouse receipts and kept a record thereof." (Vol. 2, p. 350.)

"The mill warehousemen devoted their services to the business of the National except for the time necessary to perform the duties required of them on behalf of the Warehouse Company, which was usually about thirty minutes a day; generally the mill warehousemen were clerical employees of the National with duties confined to the office.

"The salaries of the central control warehouseman and the mill warehouseman, premiums on the warehousemen's bonds, the cost of printing warehouse receipts and all other forms, the expense of qualifying the Warehouse Company in various States where the National operated and every other expense that accrued in warehousing the seed and products was paid by the National; a monthly bill was rendered by the

Warehouse Company for salaries and expenses and it was reimbursed by the National. It was conceded that the National reimbursed the Warehouse Company for every expense it incurred, and paid the Warehouse Company a fixed fee of $666.66 per mill for the season. The total of all expenses amounted to the net sum of $19,304.73 for the season of 1934-35.

"The National bought, paid for and acquired the title to all cottonseed which came into its possession and stored in the seed-houses.

"Unless and until warehouse receipts were issued the National had the right to crush and use the entire seed inventory, unaffected by any provision of the warehousing agreement.

"Prior to the issuance of warehouse receipts the cottonseed was stored in the various seed-houses. After receipts were issued there was no change of actual possession. Operations continued exactly as before and the seed was handled exclusively by National's employees.

"The Warehouse Company had no employees stationed at the plants of the National who took any part in the handling of the seed from the time the seed were received and placed in the seed-houses and the products were shipped out.

"The National's mill superintended and the employees under him went in and out of the buildings and seed-houses during the crushing season of 1934-35 discharging their duties in the ordinary way. It was necessary for the mill superintendent and the employees to have free and uninterrupted access to the seed-houses, the meal houses, the cake storage space, the linter houses, platforms and the hull houses in order to carry on the crushing of the seed and marketing of the products.

"About ninety employees of the National worked daily at the Dixie plant and a proportionate number at the other plants, according to the size of the plant.

"The seed was stored in bulk in the seed-houses and no attempt was made to segregate the seed under warehouse receipt from the bulk. Neither seed nor products were tagged, labeled or marked.

"When cottonseed was withdrawn from the cottonseed houses for crushing purposes it was removed by mechanical conveyors operated exclusively by employees of the National feeding the seed into the conveyor by hand. The entire operation was performed under the supervision of the plant superintendent.

"When the seed was crushed the oil would run into settling tanks where it would remain for several days and from there it would be pumped into storage tanks.

"The cake would go into the grinding room adjoining the crushing-room where it would be broken into nuts or ground into meal and conveyed by machinery into bins which were a part of the main mill building.

"The linters would go directly to a linter-house, shed or platform and remain there until sold and shipped out; the hulls would go to the hull-houses.

"The cottonseed-houses were never locked and no means were employed for excluding the National and its employees from them.

"When the mills were not in operation some of the mill buildings, not the cottonseed-houses, were locked and the plant superintendent and nightwatchman only carried the keys.

"When the mills were closed down and at nights when not running and on Sundays a nightwatchman in the employ of the National was on the premises and was in charge of the plant as watchman.

"Business was freely transacted whenever necessary in the mill buildings, the seed-houses, the hull-houses by employees of the National and its customers.

"Neither the mill manager nor the plant superintendent was required to obtain specific permission from the Warehouse Company to withdraw seed for crushing or products for sale and shipment.

"At no time prior to January 23, 1935, did any mill warehouseman interfere in any way with the operation of the plant, with the handling or crushing of the seed or the handling and sale of products.

"Throughout the season 1934-35 the National crushed its seed and sold its products in the ordinary course of business, collected from its customers and deposited the proceeds of sale in its general bank account.

"To ascertain the quantity of seed withdrawn from the seed-house by conveyor for crushing in the mill, a seed-house by conveyor for crushing in the mill, a theoretical figure is used; the theoretical figure or factor determined the grade and the indicated yield of products per average ton of cottonseed, and mills usually employ such a factor as to cause the withdrawal of a less number of cottonseed than is indicated by the theoretical factor; the actual quantity on hand may be adjusted from time to time as the quality of the seed varies or when the entire quantity of seed are crushed. When the seed was sold and finally disposed of in this cause there was no shortage of seed on hand compared with outstanding warehouse receipts."

"The mill managers and mill warehousemen kept no record of outstanding warehouse receipts against the seed and products in their respective mills and if this information was desired it would have been necessary to ascertain it from the central control warehouseman in Memphis. The quantities were shifting from time to time." (Vol. 2, pps. 350-354.)

"Warehouse receipts were issued from time to time for 100 tons or other convenient quantity of cottonseed and each receipt specifically designated the location of the seed or products described therein at a particular mill.

"During the operating season of 1934-35 cottonseed was crushed or shipped at times when seed on hand at the respective mills was less than the quantity called for by outstanding warehouse receipts designating seed at the respective mills. The Trustee audited the

records of the Warehouse Company and submitted a comparative statement of cottonseed on hand at various mills and warehouse receipts issued, which statement showed an over-issuance of warehouse receipts on the dates disclosed. On the closing date of the audit there was, however, cottonseed on hand at each mill in excess of outstanding warehouse receipts."* (Vol. 2, pps. 354-355.)

Although the warehouse receipts (conforming on their face to the requirements of the Negotiable Warehouse Receipts Act) designated the quantity called for by the receipt, the town and state in which the seed or products was located, and the warehouse number—the banks, the bankrupt and the warehouseman utterly disregarded all this and after this litigation started, claimed that they had an agreement whereby warehouse receipts could be outstanding and held as collateral calling for seed or products at a specified mill, when in fact there were no seed or products there, provided there was excess seed or products at some other mill in some other town, or in some other state. The Master finds and reports that there was a general agreement and understanding to that effect (Vol. 2, pps. 355 & 521). "At times warehouse receipts for cottonseed at a specified mill were issued when there was no seed at that mill. It was said to be a general arrangement and understanding * * *." (Vol. 2, p. 356.)

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*The Master by supplemental report corrected the last sentence in the second paragraph above quoted and the last sentence in the fifth paragraph above quoted, by showing that on the closing date, and at the time the seed was shipped out, there was an over-issuance of receipts at some of the mills calling for 1139 tons of seed, and an under-issuance at other mills of 431 tons of seed, leaving a net over-issuance of 708 tons (Vol. 2, pp. 519-520).

Loans would only be made to the bankrupt upon satisfactory evidence that firm contracts had been made for the sale of the oil to be recovered from its cottonseed inventory (Vol. 2, p. 363).

> "The financial statements and monthly balance sheets showed the seed and products inventory among current assets, but did not show that such property was hypothecated; the statements were furnished the Banks monthly and the Trustee claims that the Banks ratified and approved the National's action in showing such assets as free and unpledged.
>
> "Each oil purchaser testified that they entered into their contracts knowing that the National were large buyers of seed and assumed that it was manufacturing the seed and relied upon that knowledge and had no knowledge that the seed inventory had been pledged." (Vol. 2, p. 477.)
>
> "That the Chemical Bank from and after December 11, 1934, went into the arrangement with full knowledge that the oil had been sold for future delivery; * * *." (Vol. 2, p. 477.)

The exhibits prepared by the Trustee's auditors from the records of the warehouse company (Exhs. 207-215) showed that warehouse receipts were issued and allowed to remain outstanding without any regard to quantities on hand. The Master found and reported:

> "* * * It was his (the Trustee's) further insistence that an audit (Exhs. 207-215) disclosed that the Warehouse Company did not attempt to make quantities on hand correspond to outstanding warehouse receipts and that the head warehouseman was forced to admit it, and I so find." (Vol. 2, p. 346.)
>
> "No signs indicating the warehousing of cottonseed products were printed, but the sign (Exh. 18) covering cottonseed was in some instances posted where products were stored in the rented spaces and in several

instances posted on linter, hull and meal houses. No effort was made to give any kind of notice that products were being warehoused except as stated by the use of a cottonseed sign. After the filing of the proceedings herein a rush order was placed for products signs and they were posted in conspicuous places on product storage spaces, oil tanks, meal, hull and linter houses and platforms.

"It was understood between the National and the Warehouse Company that products at any mill could be shipped though the amount on hand was smaller than the outstanding warehouse receipts, provided that there were excess quantities at other mills; that for this purpose warehouse receipts calling for cottonseed cake could be used to cover excess quantities of meal at that mill; that meal and cake were interchangeable products, that the grade of linters were interchangeable regardless of the grade on hand." (Vol. 2, pps. 361-362.)

The loan agreement pursuant to which the claimant banks took and held the warehouse receipts in question contained the following vitiating provision:

"It is understood however by the parties hereto that the said cottonseed Corporation has the right to consume or use such of said items as by their nature are necessarily consumable for the purpose of operating said mills, and has the right to sell and ship out such of said items as must be sold in the ordinary and usual operation of said business, such use and sale being necessary to secure the cash funds with which to purchase more cottonseed, products and supplies thus enabling them to make the continuing turnovers necessary to the profitable operation of a cottonseed oil mill business. (Exh. 391, p. 4.)" (Vol. 2, p. 363.)

The Master concluded his finding of Evidentiary Facts as follows:

> "It is contended by the Trustee that the credit extension agreement with the Banks (Exh. 391), the agreement on the part of the Chemical Bank & Trust Company (Exh. 16), the issuance of the trust receipts (Exhs. 339, 340, 341), and the testimony of the President of the Chemical Bank, all evidence the fact that the National should consume by use and exhaust by sale all of the pledged property and repay the Banks the money borrowed, and I find that these documents show the knowledge and intent of the parties." (Vol. 2, p. 364.)

ASSIGNMENT OF ERRORS.

The United States Circuit Court of Appeals for the Sixth Circuit erred in failing and refusing to reverse the decree of the District Court and in holding that the field warehouse receipts on cottonseed were valid and adequate to vest a lien in the respondent banks as pledgees thereof. This was error because:

(a) Neither the respondent banks nor the field warehouseman ever had the actual, open and exclusive possession of the cottonseed.

(b) The warehousing arrangement did not contemplate any actual change of possession, except on paper and in theory, and there was no change of possession after the warehousing arrangement was made, nor after the receipts were issued. Operations continued exactly as before and the seed was handled exclusively by the Bankrupt's employees.

(c) The respondent banks and the Bankrupt agreed in writing that the Bankrupt should have the right to con-

sume and use the cottonseed and to sell and ship out the products in the ordinary and usual operation of the business.

(d) The respondent banks, the warehouseman and the Bankrupt entered into an agreement whereby is was understood and agreed that the Bankrupt could consume and use any or all of the cottonseed stored at any one or more of its mills, although covered by specific receipts calling for seed at that location, without a surrender of the receipt, provided, there were excess seed at some other mill in some other location. This was in direct violation of the Tennessee Uniform Warehouse Receipts Act; and it was error for the Court to hold that the receipts could be so altered by oral agreement between the respondent banks, the warehouseman and the Bankrupt, as against creditors and the Trustee in Bankruptcy. Such agreement falsified every warehouse receipt and contravened the terms of the Warehouse Receipts Act.

POINTS OF LAW.

I.

There can be a valid arrangement whereby "field warehousing" can be conducted and pursuant to which negotiable receipts can be issued, affording valid security to the holder of the receipts.

Union Trust Co. v. Wilson, 198 U. S. 530, 25 S. Ct. 766, 49 L. Ed. 1154;
Bank of Rome v. Hazelton, 83 Tenn. 216.

II.

The fundamental requisite to any form of warehousing as a basis for the issuance of warehouse receipts, be it field

warehousing or the ordinary and customary manner of warehousing, is that the warehouseman must take and maintain the sole, open, actual and exclusive possession of the property. The warehousing arrangement is essentially a bailment which cannot exist without the actual transfer of possession.

The basic and fundamental principles underlying this rule are that (1) a debtor cannot create an unrecorded lien upon his property in favor of one or more creditors and retain possession with outward show of ownership, and (2) retention of possession with express or implied right to consume in use and exhaust by sale is inconsistent with and repugnant to any form of lien.

See cases cited under next proposition.

III.

In order that a warehouse receipt, negotiable in form, issued pursuant to a field warehousing arrangement, may attach to the property, or vest any right to the property in the holder, the warehouseman must take and maintain the actual, open and exclusive possession and control of the property.

Union Trust Co. v. Wilson, 198 U. S. 530, 25 S. Ct. 766, 49 L. Ed. 1154;
Bank of Rome v. Hazelton, 83 Tenn. 216;
Security Warehousing Co. v. Hand, 206 U. S. 45, 51 L. Ed. 1117;
Security Warehousing Co. v. Hand (C.C.A. 7th), 143 Fed. 32;
Love v. Export Storage Co. (C.C.A. 6th), 143 Fed. 1;
American Can Co. v. Erie Preserving Co. (D.C.), 171 Fed. 540 (C.C.A. 7th), 183 Fed. 96;
67 C. J. 465, Sec. 36;

Maryland Casualty Co. v. Washington L. & B. Co. (Ga.), 145 S. E. 761, 61 A.L.R. 323;
McGaffey Canning Co. v. Bank of America, 294 Pac. 45, 109 Cal. Apps. 415;
Negotiable Warehouse Receipts Act, Williams Tenn. Code, Sec. 7587;
Sec. 50, Uniform Warehouse Receipts Act (Adopted in Illinois, Arkansas and Texas);
Vol. 3, Uniform Laws Annotated, p. 83.

IV.

There is no deposit with the warehouseman sufficient to pass any right, title or interest in the property by virtue of a receipt issued thereon, if the goods are stored on the premises of the debtor and the debtor has access to, and partial control over or use of the property. And this is true, even though the warehouseman takes a lease on the premises, puts up signs, employs a nominal custodian, contracts for the exclusive possession of the premises, walls off the premises and puts on locks. Access to, partial control over and use of the property by the debtor, substantially as before, vitiates all forms which the parties may go through.

Security Warehousing Co. v. Hand (C.C.A. 7th). 143 Fed. 32; 206 U. S. 415;
American Can Co. v. Erie Preserving Co. (D.C.), 171 Fed. 540 (C.C.A. 7th), 183 Fed. 96;
Love v. Export Storage Co. (C.C.A. 6th), 143 Fed. 1;
In re: Rogers (C.C.A. 7th), 125 Fed. 169;
Re: Spanish-American Cork Products Co. (C.C.A. 4th), 2 Fed. (2d) 203;
Fourth St. Nat'l Bank v. Milbourne Mill Cos., Trustee (C.C.A. 3rd), 172 Fed. 177;
McGaffey Canning Co. v. Bank of America, 294 Pac. 45, 109 Cal. App. 415;
67 C. J. 486 (Warehousemen Sec. 69).

V.

Since actual, open and exclusive possession and control by the warehouseman, as distinguished from merely formal or colorable control, is absolutely essential to pass any right or interest in the property to the holder of a warehouse receipt, it becomes necessary to determine in this case whether the formalities gone through by the warehouseman have resulted in actual and exclusive possession.

(a) Taking a lease providing for exclusive possession by the warehouseman, lessee, is wholly insufficient to constitute exclusive possession if the debtor's use of the premises and access to the goods stored therein, "continues substantially as before."

Security Warehousing Co. v. Hand (C.C.A. 7th), 143 Fed. 32; 206 U. S. 415;
Williams v. First Nat'l. Bank, 150 Tenn. 15;
In re: Rogers (C.C.A. 7th) 125 Fed. 169;
American Can Co. v. Erie Preserving Co. (D.C.), 171 Fed. 540 (C.C.A. 7th), 183 Fed. 96;
Re: Spanish-American Cork Products Co. (C.C.A. 4th), 2 Fed. (2d) 203;
McCaffey Canning Co. v. Bank of America, 294 Pas. 45, 109 Cal. App. 415.

(b) Placing a nominal representative or custodian on the premises is insufficient if the debtor be permitted access to and use of the goods stored on the premises, substantially as before.

Security Warehousing Co. v. Hand (C.C.A. 7th), 143 Fed. 32;
Love v. Export Storage Co. (C.C.A. 6th), 143 Fed. 1;
American Can Co. v. Erie Preserving Co. (D.C.), 171 Fed. 540 (C.C.A. 7th), 183 Fed. 96;
Re: Spanish-American Cork Products Co. (C.C.A. 4th), 2 Fed. (2d) 203;
Re: Coats, Bennett & Reidenbach (C.C.A. 2nd), 12 Fed. (2d) 497.

(c) Putting up signs is wholly insufficient if the debtor continue to use its raw material and stock in trade substantially the same after the issuing of the receipts as before. The right of the receipt holder to any interest in the property depends upon actual, open and exclusive possession by the warehouseman and nothing can substitute for it. There is no transfer of possession by merely putting up signs which say that the exclusive possession is in the warehouseman.

Hyman v. Semmes (C.C.A. 6th), 26 Fed. (2d) 10;
Re: Coats, Bennett & Reidenbach (C.C.A. 2nd), 12 Fed. (2d) 497;
Re: Spanish-American Cork Products Co. (C.C.A. 4th), 2 Fed. (2d) 203;
Security Warehousing Co. v. Hand (C.C.A. 7th), 143 Fed. 32;
Ommen v. Talcott (C.C.A. 2nd), 188 Fed. 401.

(d) A combination of all the formalities enumerated in (a), (b) and (c) is wholly ineffectual to constitute valid warehousing. There can be no substitute for the actual, open and exclusive possession by the warehouseman.

(See cases cited under (a), (b) and (c).

VI.

Signs inconspicuously placed and difficult to read fall within the following characterization by the Circuit Court of Appeals for the 2nd Circuit:

> "This is one of the innumerable schemes by which merchants have attempted to create liens on their goods which shall be unknown to their creditors and shall not affect their credit, but which shall be enforceable if bankruptcy occurs. They are all based on the idea of giving notice enough to satisfy the law and not enough to inform the creditors."
>
> Ommen v. Talcott (C.C.A. 2nd), 188 Fed. 401.

VII.

The fact that a debtor agrees never to reduce the stock on hand below the quantities indicated in the warehouse receipts does not establish the requisite "actual possession and control" and does not support the warehousing arrangement. That fact does not validate the transaction and the holder of the receipts cannot prevail against a trustee in bankruptcy.

American Can Co. v. Erie Preserving Co. (D.C.), 171 Fed. 540 (C.C.A. 7th), 183 Fed. 96;

Fourth St. Nat'l Bank v. Milbourne Mills Cos., Trustee (C.C.A. 3rd), 172 Fed. 177;

Bank v. Ebbert & Co., 9 Heisk. 153.

(Note: An agreement that the manufacturer will not reduce the quantities below the quantities indicated in the receipts presupposes access to, use of and control over the goods by the manufacturer and requires him to limit his own use and control of the goods. It negatives the idea of actual and exclusive possession in the warehouseman.)

VIII.

Warehouse receipts, although negotiable in form and containing all elements prescribed by the statutes, are invalid and vest no right in the holder if, in reality, the receipts do not describe any specific property, but simply call for specified quantities out of a fluctuating whole.

Interstate Banking Co. v. Brown (C.C.A. 6th), 235 Fed. 32;

Fourth St. Nat'l Bank v. Milbourne Mill Cos., Trustee (C.C.A. 3rd), 172 Fed. 177.

IX.

Even though a blanket receipt calling for "all the goods" of a depositor at a given location might be valid, the aggre-

gate of a number of receipts cannot be used to impress a lien upon a fluctuating quantity.

Interstate Banking Co. v. Brown (C.C.A. 6th), 235 Fed. 32.

X.

The Uniform Negotiable Warehouse Receipts Act provides that the receipt shall state the location of the warehouse in which the goods are stored.

This provision and requirement is conclusive of the invalidity of warehouse receipts issued pursuant to an agreement in direct conflict therewith; as in this case, the location of the commodity, as to city, county or state, was by agreement utterly disregarded—if the quantity was on hand at any one of the ten mills, located in eight cities and four states.

Williams Tennessee Code, Sec. 7533-a;
Sec. 2, Uniform Warehouse Receipts Act (Adopted by Illinois, Arkansas and Texas);
Vol. 3, Uniform Laws Ann., p. 6.

XI.

An agreement which contemplates the uninterrupted use by the debtor of quantities of seed or products at one mill in disregard of the outstanding warehouse receipts for seed or products at that mill provided there were excess quantities at a mill in some other state, would nullify and destroy any warehousing arrangement, even if it was otherwise valid, for the following reasons:

(a) The Uniform Negotiable Warehouse Receipts Act requires that the receipt shall state the location of the warehouse in which the goods described in the receipt are stored.

(b) Such an arrangement presupposes the unqualified right to use and sell all or any part of the seed or products at any particular mill. It presupposes an agreement enabling the debtor to deal with the public on the basis of an unfettered right to crush the seed and sell the products, against both of which receipts were outstanding.

(c) It presupposes the right of the receipt holders to assert title to seed or products at Jackson, Tennessee, based upon warehouse receipts calling for seed or products at Morrilton, Arkansas. It assumes that the holder of a receipt calling for seed at Dyersburg, Tennessee, could prevail against a creditor with an attachment or execution levied on seed at Pine Bluff, Arkansas, against which no receipts had been issued.

The Master states some controlling propositions of law, as follows:

"It is conceded on the briefs that the law of Tennessee is controlling, since the warehouse receipts and trust receipts were executed and negotiated in Tennessee, and this concession seems sound. Re: Collinwood Motor Sales, 72 Fed. (2d) 137, 139. (1934, C.C.A. 6.)" (Vol. 2, p. 378.)

"This use of such instruments of title or lien meets at the threshold, the law of Tennessee, which is firmly established, that there can be no title or lien on personal property that may be consumed by use or exhausted by sale. Manufacturing Co. v. Nordeman, 118 Tenn. 384, Tennessee National Bank v. Ebbert & Co., 56 Tenn. 154, Morgan Bros. v. Dayton Coal & Iron Co., 134 Tenn. 228, General Motors Acceptance Corp. v. Greene County Union Bank, 95 S. W. (2d) 948." (Vol. 2, p. 386.)

ARGUMENT.

After finding the evidentiary facts above set forth, the Master summarized his findings and stated his conclusion as follows:

> "Upon consideration of all the evidentiary facts herein found and stated, I am unable to view them other than that the warehouse company had the necessary legal possession of the cottonseed-houses and the exclusive charge and control of the cottonseed contained therein under the decisions defining the law applicable to the relationship of the parties; and, upon the whole record, that the outstanding warehouse receipts for cottonseed are valid." (Rec. V. 2, p. 370.)

That conclusion means no more than that the Master was of the opinion that the unrecorded leases gave the warehouse company legal possession of the cottonseed houses, and that the appointment of an employee of the bankrupt at each mill as custodian gave the warehouse company the exclusive charge and control of the cottonseed.

It seems certain that both the District Court and the Circuit Court of Appeals gave undue weight to this conclusion reached by the Master. It is respectfully submitted that the conclusion is not entitled to the weight accorded it, unless it conforms to the decisions of this Honorable Court and the Supreme Court of Tennessee when applied to the "evidentiary facts found." In the Hand case the warehouse company took leases and appointed custodians and put them under bond, and did everything the warehouse company did in the case at bar. This Honorable Court held that the leases did not give the warehouse company possession of the premises and that the appointment of custodians, requiring bonds, putting up signs and other formalities gone

through, did not give them the "exclusive charge and control" of the merchandise.

We have heretofore set forth the evidence as found and reported by the Master, and we desire to repeat that neither side has filed exceptions to those Evidentiary Facts. It is settled under the Federal authorities that such findings must be accepted by the parties as true. (Fleming v. Noble, 250 Fed. 733 (C. C. A. 1st).

Those Evidentiary Facts establish to a certainty the following:

(1) Actual possession of the cottonseed and products remained in the bankrupt exactly as before the receipts were issued and the bankrupt continued in business, crushing seed and selling products exactly as before. The Master reports:

> "* * * After receipts were issued there was no change of actual possession. Operations continued exactly as before, and the seed was handled exclusively by National's employees." (Vol. 2, p. 351.)

And:

> "* * * Throughout the season 1934-1935 the National crushed its seed and sold its products in the ordinary course of business, collected from its customers and deposited the proceeds of sale in its general bank account." (Vol. 2, p. 353.)

(2) It was understood by the banks, the bankrupt and the field warehousemen that under the field warehousing arrangement the bankrupt was to be permitted to consume

by use and exhaust by sale all the pledged property. The Master reports:

> "It is contended by the Trustee that the credit extension agreement with the Banks (Exh. 391), the agreement on the part of the Chemical Bank & Trust Company (Exh. 16), the issuance of the trust receipts (Exhs. 339, 340, 341), and the testimony of the President of the Chemical Bank, all evidence the fact that the National should consume by use and exhaust by sale all of the pledged property and repay the Banks the money borrowed, and I find that these documents show the knowledge and intent of the parties." (Vol. 2, p. 364.)

It is respectfully submitted that this case cannot be distinguished from Security Warehousing Company v. Hand, 206 U. S. 415, 51, 27 Sup. Ct. 720, L. Ed. 1117. Counsel for the banks have never successfully distinguished it, the Master made no attempt to distinguish it, and neither the District Judge nor the Court of Appeals attempt to distinguish it.

The facts of that case are reported fully in the statement preceding the opinion of the Circuit Court of Appeals (143 Fed., p. 32). There a company authorized to do a warehousing business (1) took a lease on a portion of the debtor's premises, (2) appointed a custodian and placed him under bond, (3) stored the goods to be warehoused on the leased portion of the premises, (4) enclosed the leased portion of the premises with substantial slatted enclosures, and (5) placed thereon padlocks bearing the following: "Premises of Security Warehousing Company of New York, Chicago, Illinois," (6) the custodian kept the key on a ring with keys belonging to himself and the bankrupt; (7) the door was kept locked except when necessary to enter the

enclosures; (8) signs were placed on the inside of the enclosures; (9) cards stating that the goods belonged to the Security Warehousing Company were affixed to the cases of goods.

The Court held that all of the foregoing failed to constitute the requisite possession by the warehouseman because the evidence showed (1) that the bankrupt continued to use portions of the leased premises not enclosed by the partitions for its own storage purposes as it had before; (2) that goods not covered by warehouse receipts were put in and taken out of the enclosures by the employees of the knitting company; (3) that the custodian was absent from the premises a large part of the time and left the keys with an employee of the bankrupt; (4) that the bankrupt's shipping clerk filled orders from cases without or within the enclosures, as need required.

With respect to the foregoing facts, the Circuit Court of Appeals, in the course of its opinion, holding the arrangement insufficient to constitute a pledge, said:

> "Delivery of possession is the very life of a pledge. No mere agreements respecting possession can create it. The contract of pledge cannot exist outside of the fact of change of possession. The pledgor must dispossess himself openly, completely, unequivocally and 'without deceptive combinations which lead third persons into error as to real possessor of the thing.' And the pledgee must take and maintain an open, exclusive and unequivocal possession." (143 Fed., p. 41.)

And:

> "The Security Company's agent on the ground to maintain an open, unequivocal and exclusive possession was the cashier of the knitting company who had charge

of the stock and of shipping. The key to the enclosure was kept on a ring with other keys used in the business of the knitting company, and this bunch of keys was accessible to the manager of the knitting company and was left at the office of the knitting company during the cashier's absences, substantially the same conditions obtained at Racine.

"If a creditor desired to look over the property of the knitting company, what would be the probable result? The cashier or shipping clerk or manager could take the bunch of keys, unlock the warehouse, show the raw materials and broken stock outside of the slatted enclosure, point out the quantity of goods within the enclosure, explain the necessity of the enclosure to prevent pilfering of the hosiery, etc., when the warehouse was opened; and nothing would warn the creditor of the deception, and the evidence satisfies us that at least one creditor was so deceived." (143 Fed., p. 41.)

In the Supreme Court statement of the facts, it said:

"These two places were occupied by the knitting company with their goods to be sold, and the goods were placed on the premises really occupied by the knitting company, although in form leased by it to the warehousing company, and the so-called warehouse receipts were given to the knitting company by the warehousing company, acknowledging the receipt of the property at such places. There was no change of possession in fact, and scarcely any in form. These receipts were in turn pledged by the knitting company to various banks, and moneys obtained upon the security of such receipts from them. The general character of business of this form is stated in Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. Ed. 1154, 25 Sup. Ct. Rep. 766, but the particular facts in this case, given in detail as findings by the referee, and adopted by the district court and circuit court of appeals, may be found in 143 Fed., supra." (51 L. Ed., p. 1118.)

It denied the receipt holder's claim to a lien; and all the formalities gone through were held to be wholly inadequate to establish the possession which the law requires. The language of the Court in denouncing such an arrangement is so forceful that we quote the following from it:

> "The general law of pledge requires possession, and it cannot exist without it. Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779. There was scarcely a semblance of an attempt at such change of possession from the hands of the knitting company to the hands of the warehousing company. Actual possession of the property in question was exercised by and existed with the knitting company substantially the same after the issuing of the receipts as before. It is a trifling with words to call the various transactions between the knitting company and the warehousing company a transfer of possession from the former to the latter. There was really no delivery, and no change of possession, continuous or otherwise. The alleged change was a mere pretense, a sham." (206 U. S. 421, 51 L. Ed., p. 1122.)
>
> "The only property within the enclosures was the knitting company's. The knitting company did not want storage room, but collaterals, which the security company agreed to furnish for a commission upon the amount thereof plus all expenses. The security company's only agents on the scene were the agents of the knitting company." (206 U. S. 421, 51 L. Ed., p. 1122.)
>
> "So far from the security company's maintaining an open, exclusive, unequivocal possession during the two years this arrangement was carried on, it seems to us that the security company might as well have been eliminated, and the knitting company have employed its own stockkeepers and shipping clerks as custodians for intending lenders, directly, instead of indirectly through the security company. In that view this becomes one of the cases 'in which the exclusive power of the so-called bailee' (Union Trust Co. v.

Wilson, 198 U. S. 530, 537, 49 L. Ed. 1154, 1156, 25 Sup. Ct. Rep. 766) tapers away to nothingness (Drury v. Moors, 171 Mass. 252, 50 N. E. 618; Tradesmen's Nat. Bank v. Kent Mfg. Co., 186 Pa. 556, 65 Am. St. Rep. 876, 40 Atl. 1018).

"The actual transactions in the case at bar differ radically from the facts as stated in Union Trust Co. v. Wilson, supra. The court there held that there was sufficient proof to show a change of possession, and that the transaction was valid within the law of the state of Illinois. Assuming the law of Wisconsin to be the same on the subject of possession by the pledgee of the property pledged, the facts in this case are so different from the Wilson case as to prevent that case from forming a foundation for holding there was a sufficient change of possession here to make the pledge a valid one." (206 U. S. 422, 51 L. Ed. 1122.)

Space will not permit us to quote further from authorities, but we most respectfully direct attention to the following cases, all of which condemn and strike down warehousing arrangements similar to this:

In re: Rogers (C. C. A. 7th), 125 Fed. 169;
Williams v. First Nat'l Bank, 150 Tenn. 15;
Hyman v. Semmes (C. C. A. 6th), 26 Fed. (2d) 10;
In re: Spanish-American Cork Products Co. (C. C. A. 4th), 2 Fed. (2d) 203;
McGaffey Canning Co. v. Bank of America, 294 Pac. 45, 109 Cal. Apps. 415;
American Can Co. v. Erie Preserving Co. (D. C.) 171 Fed. 540, (C. C. A. 7th) 183 Fed. 96;
Fourth Street National Bank v. Milbourne Mill Co., Trustee (C. C. A. 3rd), 172 Fed. 177;
Hamilton Ridge Lumber Sales Corp. v. Wilson (C. C. A. 4th), 25 Fed. (2d) 592.

The banks are not entitled to the proceeds of the sale of the cottonseed unless they have "liens valid under state

law" (Benedict v. Ratner, 268 U. S. 353; 69 L. Ed. 991; 45 Sup. Ct. Rep. 566 (1925).

With respect to this the Master said:

> "It is conceded on the briefs that the law of Tennessee is controlling, since the warehouse receipts and trust receipts were executed and negotiated in Tennessee, and this concession seems sound. (Re: Collinwood Motor Sales, 72 Fed. (2nd) 137, 139 (1934, C. C. A. 6)." (Vol. 2, p. 378.)

Tennessee has always inexorably required an absolute, open and notorious change of possession to support a pledge of personal property, and has never permitted the use of leases, signs, contracts and agreements to be used as a substitute for change of possession (Williams v. First National Bank, 150 Tenn. 15, 261 S. W. 973).

And the Supreme Court of Tennessee has, without exception, declared void every attempt at pledge of personalty, no matter what form the parties used, which either expressly or impliedly reserved to the debtor the right to consume the property by use or exhaust it by sale. The Master says:

> "This use of such instruments of title or lien meets at the threshold, the law of Tennessee, which is firmly established, that there can be no title or lien on personal property that may be consumed by use or exhausted by sale." (Vol. 2, p. 386.)

In the case at bar the debtor and those interested in it, many of whom were stockholders and directors of the banks, desired to keep it going after it had lost all of its operating capital, and they did keep it going until they almost entirely wore out the bondholders' security. (Property se-

curing $1,216,000.00 worth of bonds only brought $453,-300.00) (Vol. 2, p. 410). To do this the field warehousing system was devised, with the intent and purpose on the part of the banks and the bankrupt of keeping its every asset covered by secret liens, so that the bankrupt could operate with every outward show of a solvent going concern, obtain credit, and then when the inevitable crash should come, the banks would assert claims to every asset to the exclusion of all other creditors.

With respect to such an arrangement, the Supreme Court of Tennessee has said:

> "Creditors, or those bound as security for other persons, cannot be permitted to secure their honest debts on the debtor's property, and at the same time to cover his remaining all from every other creditor, with the intent to let the debtor use and exhaust his means of payment, reserving the object secretly intended to be applied to the mortgagee's debt. Hence it is that the face of the courts has always been so strongly set against these sweeping deeds." (Morgan Bros. v. Dayton Coal & Iron Co., 134 Tenn. 228, at p. 267.)

And:

> "It seems, therefore, to be entirely settled in Tennessee, as indeed it is in many states, that a mortgage given upon property necessarily consumable in its use, where the possession and right of user is reserved in the grantor, is null and void; also that a mortgage upon a stock of goods, where the right of possession and user, in the usual course of business is retained in the mortgagor, is null and void." (134 Tenn. 228, at pps. 271-272.)

RECEIPTS VOIDED BY COLLATERAL AGREEMENT.

The warehouse receipts were issued from time to time for one hundred tons or other convenient quantities of cottonseed, and each receipt specifically designated the location of the seed or products described therein at a particular mill as required by statute (Vol. 2, p. 354).

> "The warehouse company in October or November made an agreement with the National that it could crush seed at any one mill regardless of outstanding warehouse receipts at that mill, provided that there was sufficient seed at other mills in excess of all outstanding warehouse receipts." (Vol. 2, p. 385.)
>
> "* * * It was his (the Trustee's) further insistence that an audit (Exhs. 207-215) disclosed that the warehouse company did not attempt to make quantities on hand correspond to outstanding warehouse receipts and that the head warehouseman was forced to admit it, and I so find." (Vol. 2, p. 346.)

And it was even proved and reported by the Master that:

> "At times warehouse receipts for cottonseed at a specified mill were issued when there was no excess seed at that mill." (Vol. 2, p. 356.)

The importance and tremendous significance of this is that the Negotiable Warehouse Receipts Act required that the receipts contain a description of the merchandise and show its location.* The agreements and methods pursued in this case utterly falsified the face of the receipts. The receipts would call for one hundred tons of cottonseed in Morrilton, Arkansas. The seed would not be there. The

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*Williams Tennessee Code, Vol. 5, provides:

"7533 3608a2. **Form of receipts and essential terms.**—Warehouse receipts need not be in any particular form, but every such receipt **must** embody within its written or printed terms:

(a) **Location.**—The location of the warehouse where the goods are stored."

banks claimed that the arrangement would permit that receipt to fasten a lien upon seed in Cairo, Illinois; Dallas, Texas, or Memphis, Tennessee, if there happened to be any excess seed at any one or more of those mills.

The audits (Exhs. 207-215) show that time and time again receipts would be outstanding calling for cottonseed at a specified mill, aggregating hundreds and sometimes thousands of tons in excess of the actual seed at that mill, and those exhibits show that there was hardly a day when there was not a large shortage at some mill.

The learned United States Circuit Court of Appeals disposed of this question as follows:

> "* * * While the Uniform Negotiable Receipts Act provides that the receipts shall state the location of the warehouse in which the goods are stored (Williams Tenn. Code 7533a), such alteration as is here complained of is permitted (Tenn. Code 1932, Sec. 7544), when, as found by the Master, the holder has agreed to accept delivery at other points."
>
> 118 F. (2d), p. 213.

The statute referred to reads as follows:

> "7544. *Altered receipts; liability and rights under them.*—The alteration of a receipt shall not excluse the warehouseman who issued it from any liability if such alteration was (a) immaterial, (b) authorized, or (c) made without fraudulent intent. If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt as they were before alteration.
>
> Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from lia-

> bility to deliver according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase. (Williams Tenn. Code, 1932, Sec. 7544.)

It is not necessary to argue that the section relied on in the opinion does not purport to vest a lien in any way, nor does it purport to deal with the rights of receipt holders as against a bankrupt's creditors or a trustee in bankruptcy, but deals only with the liability of the warehouseman. Furthermore, it appears from the wording of the statute that it is dealing only with alterations appearing on the face of the receipt, and not with secret oral agreements existing between warehousemen and receipt holders.

While this case is of tremendous importance to creditors of this bankrupt, because as the decision now stands they will receive only a nominal dividend, and at least two of the banks will receive approximately one hundred per cent of their claims, the decision is far more important and far-reaching in the effect it will have in the numberless cases to be hereafter disposed of in the National Bankruptcy Courts.

As stated in the opinion of the Circuit Court of Appeals, Sixth Circuit, petitioner has conceded that a valid system of field warehousing may be conducted. It is equally true that the system, as a business method, is widespread and perhaps of great economic importance. It is believed, however, that with full and fair compliance with the requisites

to a valid pledge of property left upon the premises of the pledgor, such a system or scheme is necessarily near the field of secret lien. It logically follows that any relaxation or disregard of the requisites to a valid lien on property left upon the premises of the pledgor at once leads to the deception and legal fraud of creditors that the rule against secret liens was adopted to avoid. If fair regard for the rights of creditors is to be preserved in bankruptcy, there should be no relaxation of such requisites.

The United States Circuit Court of Appeals cited Union Trust Co. v. Wilson, 198 U. S. 530, 25 S. Ct. 766, 49 L. Ed. 1154, in support of its holdings. It is respectfully submitted that the facts in this case do not bring it within the holding in that case. It is our respectful insistence that the field warehouseman was attempting to do exactly what the field warehouseman attempted to do in the Hand case, namely, get the Court to extend the rule announced in the Union Trust Company case to a point where the system could be operated with the debtor remaining in full possession and control of the so-called pledged property. In the Union Trust Company case Mr. Justice Holmes took particular pains to point out and emphasize that the warehousemen took and maintained the actual and exclusive possession of the pledged property. In the Hand case the Court declined to extend the rule to a system which really amounted to a contractual right to possession, but which in practical operation left the debtor in possession and use.

Paraphrasing the last paragraph of the foregoing quotation from the opinion of this Honorable Court in the Hand case, we have:

> "The actual transaction in the case at bar differ radically from the facts as stated in Union Trust

Company v. Wilson, supra. The Court there held that there was sufficient proof to show a change of possession, and that the transaction was valid within the law of the State of Illinois. Assuming the law of Tennessee to be the same on the subject of possession by the pledgee of the property pledged, the facts in this case are so different from the Wilson case as to prevent that case from forming a foundation for holding there was a sufficient change of possession here to make the pledge a valid one."

Respectfully submitted,

LOWELL W. TAYLOR,
LARRY CRESON,
Attys. for Petitioner.

SUBJECT INDEX.

	PAGE
PRELIMINARY STATEMENT	1-3
SUMMARY OF BRIEF	3-4
RELIEF SOUGHT	4
BASIS OF JURISDICTION OF THIS COURT	5
CONCISE STATEMENT OF THE CASE	5-7
LAW OF FIELD WAREHOUSING	7-8
FINDINGS OF THE MASTER	8-9
FINDINGS OF DISTRICT COURT	10
FINDINGS OF COURT OF APPEALS	10-14
REPLY TO ASSIGNMENT OF ERROR	14-16
UNRECORDED LIEN	12
RIGHT TO ALTER WAREHOUSE RECEIPTS	12
REPLY TO SUBHEADS OF ASSIGNMENT OF ERROR	15-16

TABLE OF CASES AND STATUTES.

PAGE

Bank of Rome v. Hazelton, 83 Tenn., 216 11

Security Warehousing Co. v. Hand, 206 U. S., 415, 27 Sup. Ct., 720, 51 L. Ed., 1117 .....13, 14

Security Warehousing Co. v. Hand (C. C. A., 7), 143 Fed., 32 .....13, 14

Union Trust Co. v. Wilson, 198 U. S., 530, 25 Sup. Ct., 766, 49 L. Ed., 1154 11

Statutes.

Tennessee Code of 1932, Section 7533a 11

Tennessee Code of 1932, Section 7544 .....11, 12-15

Judicial Code, Section 240 5

Supreme Court of the United States

October Term, 1940.

No. .....

A. B. PITTMAN, TRUSTEE, NATIONAL COTTONSEED PRODUCTS CORPORATION, BANKRUPT,

Petitioner,

vs.

UNION PLANTERS NATIONAL BANK AND TRUST COMPANY, ET AL.,

Respondents.

BRIEF ON BEHALF OF RESPONDENT, THE AMERICAN NATIONAL BANK OF NASHVILLE, UPON PETITION OF A. B. PITTMAN, TRUSTEE, ETC., FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

PRELIMINARY STATEMENT.

In asking the allowance of a writ of *certiorari* petitioner assigns one error and presents a single question, to-wit, the validity of field warehouse receipts upon cottonseed issued by Nashville Warehouse & Elevator Corporation to National Cottonseed Products Corporation and pledged as

collateral security by the latter to the respondent banks, Chemical Bank & Trust Company, Union Planters National Bank and Trust Company, and the American National Bank of Nashville, for loans in cash made at the time of the pledging. The warehousing of cottonseed was done under the plan known as field warehousing.

Petitioner makes the astounding assertion that the facts as found by the Special Master, the District Court and the Court of Appeals are not binding on this court for the reason that certain evidentiary facts found by the Master are alleged to be contradictory to the decision finally reached. Petitioner states that the law of field warehousing was erroneously applied to the undisputed facts in the case and further denies, (and this in spite of an express holding of the Court of Appeals to the contrary) that concurrent finding of fact exists, and alleges further that there is a conflict between several of the Circuit Courts in regard to field warehousing.

The rules of law relative to field warehousing were reported by the Master and never disputed. These rules were argued to the District Court and Court of Appeals, with no disagreement between counsel, and so far as we are aware, there is no dispute regarding the law of field warehousing and none is pointed out by petitioner.

Petitioner now asks that the determinative findings of fact and conclusions of the Master, the decree of the District Judge affirming these facts and conclusions and the decree of the Court of Appeals affirming the District Court all be now overturned in this Court on the sole and unsupported allegation that certain selected fragmentary facts found by the Master control all courts reviewing this cause,

and failure to accept petitioner's construction of these fragmentary evidentiary facts is error.

Petitioner further alleges that the facts of this case are undisputed; that the undisputed facts are favorable to the contention of petitioner that no concurrent finding of fact exists, but only a misapplication of facts to law, or of law to facts. Petitioner disregards all findings and conclusions of the Master adverse to petitioner, all findings and conclusions of the District Court adverse to petitioner, and the findings and decree of the Court of Appeals, which are adverse to petitioner and expressly hold that there is a concurrent finding of facts. No question of law is now presented. The sole question is whether a few fragmentary quotations from the Master's findings are sufficient to overturn the remainder of the Master's findings and his own construction of his findings, affirmed by two reviewing courts. Petitioner in reality asks a new finding of facts.

The respondent, The American National Bank of Nashville, replies as follows to the petition and brief:

SUMMARY OF BRIEF.

There is only one single question presented in this case:

Petitioner, on page 14 of its brief states the question as follows:

> "Were the so-called field warehouse receipts on cottonseed pledged to respondents adequate to create a lien valid under state law as against the Trustee in Bankruptcy?"

A single error is assigned and that is the failure of the United States Circuit Court of Appeals for the Sixth Circuit to reverse the decree of the District Court and in holding

the warehouse receipts valid. This assignment is broken up into four different sections, marked a, b, c, and d, all of which allege failures to comply with the rules of field warehousing. These same objections were made before the Master and the two reviewing courts, and were so completely and effectively answered by the findings and conclusions of each, that the appropriate parts thereof, which are short, will hereafter be quoted, with comment thereon.

I.

RELIEF SOUGHT.

The relief sought is correctly stated by petitioner, which is to reverse the Court of Appeals and the District Court, and declare invalid warehouse receipts on cotton seed having an aggregate value of $1,335,980.22. The petitioner, who is a Trustee in Bankruptcy, contends that the pledging of the cottonseed representing this amount was invalid and that the proceeds of the cotton seed now in bank should be delivered to the Trustee in Bankruptcy, and distributed among general creditors. The respondent banks contend that the pledging of the cotton seed was in all respects valid, and that no infirmity existed in the system of field warehousing used.

The Master, the District Court, and the Court of Appeals, held in favor of respondent, and the opinion of the Court of Appeals appears in 118 Fed. (2d), 211.

II.

BASIS OF JURISDICTION OF THIS COURT.

This respondent, The American National Bank of Nashville, agrees that this Court has jurisdiction of the matter under Section 240 of the Judicial Code as amended, and rules and decisions of this court cited by petitioner.

III.

CONCISE STATEMENT OF THE CASE.

A brief history of the facts leading to this controversy is set out in the Master's report, and being unexcepted to, and relied on by both the District Court and Court of Appeals, a statement will be made based on the Master's report, with references to the volume of the record where such is found. The bankrupt, National Cotton Seed Products Corporation, was a Delaware corporation, owning originally some nineteen oil mills, with head office in Memphis, Tennessee. In 1929, the business of the company was greatly curtailed, and a system of field warehousing was established. Proctor & Gamble Company extended a substantial line of credit to the National, secured by a pledge of warehouse receipts on cotton seed. (Vol. 2, p. 357.)

Nashville Warehouse & Elevator Corporation was duly incorporated under the laws of Tennessee, with its principal office in Nashville, Tennessee, and was engaged in the general warehouse business, owning and operating warehouses at that point, and was engaged in field warehousing for other cotton seed oil mills. (Vol. 2, p. 341.) In 1931, National negotiated with the warehousing company for the purpose of warehousing its cotton seed, and a written agree-

ment was entered into on July 9, 1931, written leases of part of the premises were executed, and a form of warehouse receipt was adopted. The warehousing company employed a head or central warehouseman with an office at Memphis, who kept records of all transactions and issued all receipts. Local warehousemen were employed at the warehouses at each mill, and a fidelity bond was required. (Vol. 2, page 341.) Various other steps complying with the laws of field warehousing were taken by the parties and will be hereinafter referred to more in detail.

Financing was done by Proctor & Gamble for about four years, when an application was made to Reconstruction Finance Corporation for a loan, which was made, and the final loan with Reconstruction Finance Corporation was made July 1, 1934, for $2,250,000.00. (Vol. 2, p. 362.) At the same time, an additional line of credit was obtained from two of the respondent banks, Union Planters National Bank & Trust Company, and The American National Bank, for approximately $450,000.00, and the warehouse receipts on cottonseed were pledged to secure such, but subject to the pledge to Reconstruction. (Vol. 2, p. 363.) Other loans with one of these banks were arranged or in existence, which do not affect the issues now presented.

The loan made by Reconstruction Finance Corporation was taken over by Chemical Bank & Trust Company on December 28, 1934. (Vol. 2, p. 364.) Many controversies regarding the taking over of this loan resulted, but are not now material, and will not be further referred to.

In brief, the system of field warehousing employed was to lease seed houses to the warehouse company and store seed therein as rapidly as purchased by the National. The

warehouse company was in possession of the warehouses and acquired possession of the seed as delivered and then issued its receipts, which were pledged to respondent banks. These receipts were made readily available, and the National would each day pay off sufficient indebtedness and have receipts delivered to it, which were then presented to the warehouse company and cancelled. The seed called for by these receipts was delivered to the National, which crushed the seed and disposed of the product free of any lien. In some instances, warehouse receipts were released on trust receipts instead of payment. No question regarding this is now material.

Seed covered by warehouse receipts was not released to or used by the National, and in one instance, when receipts were not available for cancellation, the crushing operations of the National were suspended by the Warehouse Company as a result of a refusal to deliver seed.

As these facts are found and the findings will be stated in quotations hereafter, no further citations are made at this point.

IV.

LAW OF FIELD WAREHOUSING.

The Master, in his Finding of Facts, sets out the law of field warehousing as follows:

> "The property must be delivered to the Warehouse Company, and after delivery, the sole, open, actual, and exclusive possession of it must be retained by the pledgee. . . . In field warehousing, however, the required character of possession may be constructive, provided that the warehouseman has exclusive charge

and control of the property, and proper signs are posted evidencing this possession, and as notice to the public and creditors that the warehouseman is in the actual legal possession of the property."

Vol. 2, p. 365.

V.

FINDINGS OF THE MASTER.

The Finding of Facts in regard to the warehousing of cottonseed, by the Master is as follows:

"I think the record bears the finding as an ultimate fact that the nature of cottonseed, being bulky and expensive to handle and rehandle, the method of delivery of it upon purchase, into large seed houses, and the method of operating cottonseed oil mills, that there was, and I find, delivery of the seed to the Warehouse Company."

Vol. 2, p. 369.

"Due and proper significance must be given to the fact that the cottonseed, meal and linter houses were distinct and separate buildings from all other mill property. Adequate signs of a large size were placed upon these buildings, valid leases were taken, local warehousemen were placed in charge at each mill rendering daily reports to the Memphis office, and performed the duty, and this record discloses no instance in which they neglected to perform their duty; a central control warehouseman was in charge at Memphis, who received the daily reports with all necessary information of the operation at each mill, and who kept a central control record and account of the property on hand, and the warehouse receipts issued by him against it, and upon the whole record, I think that actual, open

and exclusive possession of the cottonseed was had within the requirements of the decisions.

"The record shows without dispute the chief control warehouseman at Memphis was active in the discharge of his duties, and was constantly supervising the whole system, and was in actual charge and control, standing guard between the National and the holders of warehouse receipts. There is no evidence that he was inactive or perfunctory in the performance of his duties. He was at all times present and performing them. On December 2, 1934, he ordered the mills to cease crushing seed when there was a shortage due to the failure of warehouse receipts to be received promptly from the Reconstruction Finance Corporation at Nashville and the mills closed until the receipts were received and cancelled.

"The control of the property was recognized and respected by the National.

"Upon consideration of all the evidentiary facts herein found and stated, I am unable to view them other than that the Warehouse Company had the necessary legal possession of the cottonseed houses, and the exclusive charge and control of the cottonseed contained therein."

Vol. 2, pp. 369-370.

The foregoing findings of the Master were bitterly challenged by the petitioner before the District Court, and that Court responded as follows:

VI

FINDINGS OF DISTRICT COURT

"The warehouse receipts on cottonseed are found to be valid and lawful in all respects. There was on hand with the warehouseman at the time the petition was filed sufficient cottonseed to meet and fulfill all outstanding cottonseed receipts. The finding and conclusions of the Master to the same effect are confirmed and the Trustee's exceptions thereto are overruled."
Vol. 1, p. 279.

VII

FINDINGS OF COURT OF APPEALS

The Court of Appeals held:

"The Master found, however, in finding sustained by the Court that the seed was delivered to the Warehousing Company; that adequate signs were placed upon the buildings; that local warehousemen were in charge at each mill, rendering daily reports to the central control warehouseman in charge at Memphis, who kept an adequate control record of the property on hand; and concluded upon the whole record that the warehousing company was in actual, open, and exclusive possession of the cottonseed. There was no evidence of an inactive or perfunctory performance of the duties of the warehouseman or of his aides, and the bankrupt at all times recognized his authority. There was never any actual shortage between cottonseed on hand and receipts outstanding. The apparent shortage that seemed to have been indicated by the reports was fully explained to the satisfaction of both Court and Master, as having been due to a delay in mail delivery of warehouse receipts from the mills to the main warehouse office in Memphis. When shortage did appear, the warehouseman at least on one

occasion required the closing of the mills until the receipts were received and cancelled.

"Upon these concurrent findings of Court and Master, it is our conclusion in the absence of clear demonstration of error, that the warehouse receipts were valid and afforded security, both to the Reconstruction Finance Corporation and to the banks. *Union Trust Co.* v. *Wilson*, 198 U. S., 530. The law of Tennessee does not require a contrary view. *Bank of Rome* v. *Hazleton*, 83 Tenn., 216. The Tennessee cases cited as authority for the doctrine that there may be no lien on personal property consumed by use or exhausted by sale are not applicable since there was no withdrawal here except upon surrender and cancellation of receipts. . . . While the Uniform Negotiable Receipts Act provides that the receipts shall state the location of the warehouse in which the goods are stored (*Williams Tennessee Code*, section 7533a) such alteration as is here complained of is permitted (Tenn. Code 1932, sec. 7544) when as found by the Master the holder has agreed to accept deliveries at other points . . . .

"The charges of collusion, fraud and bad faith, though made with great insistence by the Trustee, wholly fail of support and the Master so found. . . . The adjudication by the decree that the appellees are entitled to priority in the avails of cottonseed covered by their warehouse receipts must be sustained."

(See proceedings in the United States Circuit Court of Appeals for the Sixth Circuit filed in this cause June 7, 1941, Folio 4142-4143. Also 112 Fed (2d) 211, at page 213.)

The foregoing completely sustains the contention of respondents. The facts are undisputed, but they are in favor of respondents and not in favor of petitioner.

Petitioner again quotes fragments from a long report of the Master and omits many quotations favorable to respondents. The omitted quotations, as well as some that are quoted, sustain the finding of ultimate facts by the Master, affirmed by the reviewing courts. No citations to the record are made which sustain the alleged errors in the facts.

The second point of law on page 26 of the brief of petitioner complains of an unrecorded lien in favor of one or more creditors and a retention of possession with outward show of ownership. This contention ignores the findings that field warehousing is valid, that the warehouseman had complete control and exclusive possession of the property, and that adequate signs were placed on the property. It is next urged in this same section that National retained possession of the property, consumed it by use or exhausted it by sale. This is contrary to the facts, and as pointed out by the Court of Appeals, the prohibition against consumption by use does not apply to property which first must be delivered back to the consumer after surrender and cancellation of warehouse receipts, which was done in each case.

Under Section 10 of Points of Law (Brief, p. 31), petitioner again lays great stress upon the agreement between the parties for delivery of cottonseed at other points than where originally received. The law of Tennessee in this regard is as follows:

> "If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipts as altered."
>
> Tennessee Code of 1932, Sec. 7544.

The authorization to alter is found both by the Master and the Court of Appeals as a fact. The change in the point of delivery was deliberately and rightfully agreed upon between the parties.

Other insistencies of petitioner contradict the established facts of this case, and would necessitate an entirely new set of facts as well as the concurrent findings of facts being set aside. Under present authorities the concurrent finding of facts of the Master and the two reviewing courts govern here unless error is pointed out in a convincing manner, which has not been done.

Petitioner has frequently cited and relied upon the case of *Security Warehousing Company* v. *Hand*, 206 U. S., 415, and the opinion in the same case in the Court of Appeals, 143 Fed. 32. Although each court stated that each case of field warehousing rests upon the facts presented and held the warehousing in that case insufficient, there was no departure from the rules laid down here and in the other cases cited. The holding was that under the facts of that case the rules of field warehousing were not complied with. The following appears in the opinion of the Court of Appeals in the Security case:

> "The Warehousing Company has never complied with Chapter 251, p. 415, Laws of 1899 of this State." (Wisconsin)
> 143 Fed., 33.
>
> "The receipts themselves would put the holders thereof on notice of these facts."
> 143 Fed., 40.
>
> "No signs were displayed to the passer-by. No business was sought from the public."
> 143 Fed., 40.

> "No signs on the building or on the door leading into it announced the presence of the Security Company."
> 143 Fed., 41.

The court held that the Warehouse Company could not legally operate in the State of Wisconsin that to avoid this difficulty the receipts were issued in Illinois, which was in itself illegal and this appeared on the face of the receipts; that there were no adequate signs, and no attempt to carry on a *bona fide* warehousing system, and this court denounced this attempt in the following language:

> "A mere device or subterfuge to enable the bankrupt to hypothecate the receipts and thus raise money upon secret liens on property in the possession of the pledgor and under its control."
> 260 U. S., 426.

VIII

REPLY TO ASSIGNMENT OF ERROR

As stated, a single error is assigned, which is divided into four subheads, a, b, c, and d. In reply to the subheads,—

(a) This subhead states neither the respondent banks nor the field warehouseman ever had actual, open, and exclusive possession of the cottonseed. It was never contended that the respondent banks did have any possession of the cottonseed. The respondent banks had possession of the warehouse receipts and sufficient has been quoted hereinabove to show that there is a concurrent finding that the field warehouseman did have actual, open, and exclusive possession of the cottonseed.

(b) This subhead states the warehousing did not contemplate actual change of possession, and that operations continued after warehousing as they had before warehousing. This is fully answered in the quotations from the various opinions heretofore made. The Master and the two reviewing courts held the warehouse company did have exclusive possession. As to operations, the warehousing was designed to permit continuous operation after warehousing by surrender of receipts for cancellation and delivery of the seed called for, which was the reason, and only reason operations were not interferred with. On the one occasion when receipts were not available the operation was interferred with and the mills were shut down. This is found both by the Master and the Court of Appeals, and their holdings are cited heretofore.

(c) This subhead states the respondent and bankrupt agreed that bankrupt should have the right to consume and use cottonseed and to sell and ship out products in the ordinary and usual operation of the business. This has been fully answered, and what is omitted from the alleged statement of fact is, that such permission was only upon the surrender and cancellation of warehouse receipts, thereby freeing the cottonseed from control of the warehouseman.

(d) This subhead states and challenges the agreement of holders of receipts to accept delivery of cottonseed at a point other than the original point of storage. This is expressly permitted by Tennessee Code of 1932, section 7544, and this question was decided by the Court of Appeals favorably to the respondents construing this section. This part of the opinion has been heretofore quoted.

In conclusion, this respondent submits that the law of field warehousing has been properly applied to the facts as found by the Master, the District Court, and the Court of Appeals, and that petitioner has not made a sufficient showing of any errors in this finding of fact to ask this Honorable Court to review the decision of the Circuit Court of Appeals, and therefore the writ of *certiorari* prayed for should be denied.

Respectfully submitted,

F. M. BASS,
F. A. BERRY,
CECIL SIMS,
Attorneys for Respondent, The American National Bank of Nashville.

FILED
JUL 19 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

A. B. PITTMAN, TRUSTEE, NATIONAL COTTONSEED PRODUCTS CORPORATION,

Petitioner,

vs.

No. 118

UNION PLANTERS NATIONAL BANK & TRUST COMPANY, ET AL.,

Respondents.

REPLY AND BRIEF ON BEHALF OF UNION PLANTERS NATIONAL BANK & TRUST COMPANY AND CHEMICAL BANK & TRUST COMPANY TO THE PETITION OF A. B. PITTMAN, TRUSTEE, ETC., FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

J. W. CANADA,
EDWARD P. RUSSELL,
Attorneys for Respondents, Union Planters National Bank & Trust Company and Chemical Bank & Trust Company.

SUBJECT INDEX

	Page
Preliminary Statement	1-4
The National Cottonseed Products Corpn.	5-12
The Warehouseman's Duties	20-22
This Field Warehousing Arrangement and Activity Was in Effect for Many Years Prior to the Filing of the Petition for Reorganization and Was Known Generally to the Trade	23-25
Conclusion	26-28

TABLE OF CASES

Alabama Power Co. v. Ickes, 302 U. S. 464	3
Davis v. Schwartz, 155 U. S. 631	4
Security Warehousing Co. v. Hand, 206 U. S. 415	16-18-19
Union Trust Co. v. Wilson, 198 U. S. 530	14-21

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To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

PRELIMINARY STATEMENT.

The sole and single question which the petition seeks to have reviewed is an issue of fact which has been determined adversely to the petitioner on three separate occasions. The Master, before whom over four

thousand pages of testimony were taken and before whom approximately three hundred exhibits were introduced, determined the issue of fact adversely to the petitioner. The District Court determined the issue of fact adversely to the petitioner, and the United States Circuit Court of Appeals for the Sixth Circuit likewise determined the issue of fact adversely to the petitioner.

The petitioner now asks that this court grant the petition and review the voluminous record and reverse the finding of fact which has been carefully and exhaustively considered by the Master, District Judge and the United States Circuit Court of Appeals for the Sixth Circuit with the result that there was a concurrence of opinions deciding the issue of fact adversely to the petitioner.

The controversy and issue of fact grows out of the warehousing of cottonseed against which the warehouseman issued negotiable receipts. These negotiable receipts were pledged by the National Cottonseed Products Corporation to the banks as collateral for substantial loans made by the banks to the National Cottonseed Products Corporation in due course of business.

The petitioner insists that the banks should be deprived of the collateral because, according to the petitioner's insistence, the warehouseman did not have the actual, open and exclusive possession of the cottonseed, and therefore the warehouse receipts are invalid and the banks cannot claim the benefit thereof.

It is an academic proposition that in order to have a legal and effective warehousing arrangement, it is

necessary that the warehouseman have the actual, open and exclusive possession of the goods warehoused.

As stated, the Master, the District Court and the United States Circuit Court of Appeals for the Sixth Circuit adjudged for the fact that the warehouseman did have the actual, open and exclusive possession of the cottonseed. The petition for certiorari seeks nothing more than a review of this issue of fact.

The single assignment of error appearing in the petition for certiorari on Pages 24 and 25 is addressed to this one point.

The first subdivision of the assignment of error is:

> "Neither the respondent banks nor the field warehouseman ever had the actual, open and exclusive possession of the cottonseed."

The other three subdivisions of the single assignment of error are nothing more than a restatement in different language of the contention relied upon by the petitioner and just quoted.

The petitioner has no legal right to attempt to burden this court with a review of this enormous record for the purpose of investigating this issue of fact.

Alabama Power Co. v. Ickes et al., 302 *U. S.* 464.

This court said:

> "These findings were made, after hearing, by the District Judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as

unassailable. Davis v. Schwartz, 155 U. S. 631; Adamson v. Gilliland, 242 U. S. 350."

Davis v. Schwartz, 155 *U. S.* 631.

"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Revised Statutes, Sec. 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

We respectfully suggest that the foregoing is a complete answer to the matters presented in the petition. We will, however, discuss briefly some of the arguments made by the petitioner.

NATIONAL COTTONSEED PRODUCTS CORPORATION.

National Cottonseed Products Corporation on January 23, 1935, while absolutely solvent, but lacking liquid assets for the prosecution of its business, filed its petition in the District Court of the United States at Memphis, seeking the benefits of the provisions of Section 77b of the Bankruptcy Act, and prayed for the appointment of a trustee to take charge of all of the assets of the petitioning Debtor, so that said assets could be preserved and protected until further proceedings could be had looking to

a plan of reorganization under the aforesaid Section. The corporation was at that time solvent.

Exhibit (D) to the petition showed assets of nearly $2,000,000.00 in excess of liabilities. (R. Vol. I, p. 2.)

On the same day the petition was filed, Honorable H. B. Anderson, United States District Judge, entered an order approving said petition as properly filed under Section 77b, adjudging that it was filed in good faith, and appointing J. E. Robertson and A. B. Pittman, Sr., temporary trustees, who were directed forthwith to take possession of all of the assets of the petitioning Debtor Corporation, in order to preserve the same for the benefit of all creditors and stockholders, pending further orders of the Court. (R., Vol. I, p. 25.)

The temporary trustees and their able counsel, within twenty-four hours after their appointment as such, and within eight days after the filing of the petition herein, reached the conclusion that the warehouse receipts pledged to three innocent banks to secure loans made in good faith for very large sums of money were fraudulent and void, and a petition was thereupon filed so averring. (R., Vol. I, p. 28; Vol. III, pp. 1716-17.)

Prior thereto, Trustee Pittman and his attorney went out to the mills and warehouses of the petitioning Debtor and there questioned Gwin, the warehouseman, " and the whole bunch out there, and all of these operators." (R., Vol. VIII, p. 1716.)

The predicate was then being laid for the the terrific assault upon the warehouse receipts involved, and upon

the entire system and scheme of field warehousing, upon which all independent oil mills of the south are absolutely dependent (R., Vol. I, p. 347-8, Master's Report); all within one week after the filing of the petition by the Debtor for reorganization, before the permanent Trustee was elected, and at a time when there was not a thought or suspicion that the Debtor was insolvent, and it was not.

The result of this attack upon field warehousing was that of making its reorganization impossible and of destroying the market value of the mills owned by the Debtor, which could not be operated except by large operators with sufficient capital of their own, such as Armour, Swift, etc., and it was they who later acquired the most valuable mills.

We are confident that the very desperate efforts of the Trustee and his attorney to impose upon these banks in order that the Trustee and his attorney might thereby be enormously benefited personally will not meet with the approval of this court.

The following fundamental facts are not disputed in the Record, nor in the brief of opposing counsel:

(1) The transactions of the three banks with the Debtor were the normal and ordinary banking transactions carried in the usual and ordinary way.

(2) The only compensation to the banks was the legal rate of interest or less.

(3) The Union Planters and Chemical made very exhaustive investigation to determine the solvency of the

Debtor before engaging in any business transactions with it, and were convinced thereof.

(4) The moneys loaned by the banks to the Debtor were borrowed by it in good faith for the purpose of carrying on the ordinary business in which it was engaged, and were so used.

(5) Union Planters and Chemical Bank had no financial interest in the Debtor, nor did any of its officers or directors, nor had said banks at any time sold or offered for sale any of the Debtor's stock or bonds, and, therefore, had no reason or inducement to bolster the credit of the Debtor or keep it in business or deal with it otherwise than on a sound and ordinary banking basis.

The petitioner makes the often repeated statement in the petition that the National Cottonseed Products Corporation, at the time of the filing of the petition for reorganization under Section 77b of the Bankruptcy Act, and for months theretofore, was insolvent. The plain implication of the petition is that the banks were doing business with an insolvent corporation, largely known to the public to be insolvent. Such was not the case. The petition, however, dwells upon and deals constantly with charges of insolvency.

The District Judge found for a fact that the National Cottonseed Products Corporation was solvent. In his decree he stated:

> "The bankrupt was solvent during the four months prior to the petition, and the Master's finding to the contrary is reversed and set aside. The exceptions of the respective banks to the Master's finding that

> the National Cottonseed Products Corporation was insolvent during the four months period are sustained." Tr. 279.

The Circuit Court of Appeals also found for a fact that the corporation was solvent, and stated:

> "We accept the adjudication in the decree that the bankrupt was solvent at the time of its alleged preferential payments and transfers to the appellees."

In the lower courts the Trustee charged that the banks had received certain preferential payments, but that position has now been abandoned by the Trustee, as there is no assignment on this subject in the petition for certiorari.

The petition assigns no error to the conclusion of the Circuit Court of Appeals that the corporation was solvent. It therefore is a fact judicially established that the corporation was solvent but the petitioner continues to argue to the contrary.

Obviously, the petitioner's often repeated charge of insolvency is without foundation and is intended to create a background or atmosphere for the vigorous insistence that the Master, the District Judge and the Circuit Court of Appeals all erred in concluding and finding that the warehouseman had the open and exclusive possession of the cottonseed.

We address our remarks immediately at this point to the possession of the cottonseed which the warehouseman in fact actually and notoriously and openly did have.

Speaking of the seed houses in which the cottonseed was stored and guarded by the warehouseman, the Master found and reported:

> "Adequate signs of a large size were placed upon these buildings, valid leases were taken, local warehousemen were placed in charge of each mill rendering daily reports to the Memphis office, and performed the duty, and this record dicloses no instance in which they neglected to *perform their duty;* a central control warehouseman was in charge at Memphis, who received the daily reports with all necessary information of the operation at each mill, and who kept a central control record, and account, of the property on hand and the warehouse receipts issued by him against it, and upon the whole record, I think that actual, open and exclusive possession of the cottonseed was had within the requirements of the decisions.
>
> "The record shows without dispute the chief control warehouseman at Memphis was active in the discharge of his duties and was constantly supervising the whole system and was in actual charge and control, standing guard between the National and the holders of the warehouse receipts. There was no evidence that he was inactive or perfunctory in the performance of his duties. He was at all times present and performing them. On December 2, 1934, he ordered the mills to cease crushing seed when there was a shortage due to the failure of warehouse receipts to be received promptly from the Reconstruction Finance Corporation, at Nashville, and the mills closed until the receipts were received and cancelled.
>
> "This control of the property was recognized and respected by the National.
>
> "Upon consideration of all the evidentiary facts herein found and stated I am unable to view them other than that the Warehouse Company had the nec-

essary legal possession of the cottonseed-houses and the exclusive charge and control of the cottonseed contained therein under the decisions defining the law applicable to the relationship of the parties; and, upon the whole record, that the outstanding warehouse receipts for cottonseed are valid." Tr. 369, 370.

The District Judge found and decreed for a fact that the warehouseman had the actual, open and exclusive control and possession of the cottonseed-houses and the cottonseed stored therein. The decree recites in part:

> "The warehouse receipts on cottonseed are found to be valid and lawful in all respects. There was on hand with the warehouseman at the time the petition was filed sufficient cottonseed to meet and fulfill all outstanding cottonseed receipts. The finding and conclusions of the Master to the same effect are confirmed and the Trustee's exceptions thereto are overruled." Tr. 279.

The Circuit Court of Appeals reached the same conclusion and in this language:

> "The appellant concedes that field warehousing may validly be carried on, and that the issue of warehouse receipts will afford valid security to the holders when the warehouseman takes and maintains sole, open and actual possession of the stored property. He contends that this was not true of the present system and assails the warehousing as merely colorable.'
>
> * * *
>
> "The master found, however, in findings sustained by the court, that the seed was delivered to the Warehousing Company; that adequate signs were placed upon the buildings; that local warehousemen were in charge at each mill, rendering daily reports to the

central control warehouseman in charge at Memphis, who kept an adequate control record of the property on hand; and concluded upon the whole record that the Warehousing Company was in actual, open and exclusive possession of the cottonseed. There was no evidence of an inactive or perfunctory performance of the duties of the warehouseman or his aides, and the bankrupt at all times recognized his authority. There was never any actual shortage between cottonseed on hand and receipts outstanding. The apparent shortage that seemed to have been indicated by the reports was fully explained to the satisfaction of both court and master as having been due to a delay in mail delivery of warehouse receipts from the mills to the main warehouse office in Memphis. When the shortage did appear, the warehouseman, at least on one occasion, required the closing of the mills until the receipts were received and cancelled.

"Upon these concurrent findings of court and master, it is our conclusion, in the absence of clear demonstration of error, that the warehouse receipts were valid and afforded security both to the Reconstruction Finance Corporation and to the banks. Union Trust Co. v. Wilson, 198 U. S. 530. The law of Tennessee does not require a contrary view. Bank of Rome v. Haselton, 83 Tenn. 216. The Tennessee cases cited as authority for the doctrine that there may be no lien on personal property consumed by use or exhausted by sale are not applicable, since there was no withdrawal here, except upon surrender and cancellation of receipts. Nor are decisions apposite dealing with warehouse receipts on goods which are not fungible, such as Interstate Banking & Trust Co. v. Brown, 236 Fed. 32 (C. C. A. 6). While the Uniform Negotiable Receipts Act provides that the receipt shall state the location of the warehouse in which the goods are stored (Williams Tennessee Code, Sec. 7533-a), such alteration as is here complained of is permitted (Tennessee Code, 1932, Sec.

> 7544), when, as found by the master, the holder has agreed to accept delivery at other points.
>
> "As pointed out in Union Trust Co. v. Wilson, supra, the form adopted might be emptied of significance by a different understanding between the parties which the form was intended to disguise. This record is barren, however, of any such different understanding, and the charges of collusion, fraud and bad faith, though made with great insistence by the trustee, wholly fail of support, and the master so found."

The petitioner asks that this court take in this very large record for the purposes of review and that the concurrent finding of fact of the lower courts be set aside. Such a request cannot find support in any of the cases and is at variance with the practice of this court on certiorari petitions.

FIELD WAREHOUSING.

Field warehousing is quite common. It is no different from the ordinary warehousing arrangement other than that the warehouseman has taken possession of a "field" or a particular building or piece of property on or in which bulky goods are stored and against which the warehouseman has issued his negotiable receipts.

Field warehousing has had the universal approval of all the courts for such a long time that it is unnecessary to review the origin and history of the system.

It, of course, is true that in field warehousing, just as in the ordinary, common warehousing arrangement, an essential requisite for valid and legal warehousing of the

goods is that the warehouseman be in actual, open and exclusive possession of the goods warehoused.

Each case is dependent upon its own facts. The petitioner has made the bold and startling statement that "the various applications of the rule there announced have resulted in uncertainty and conflicts in the various circuits, and the decision in this case has resulted in a conflict between the Sixth Circuit and other Circuits, namely, the Second, Third, Fourth and Seventh Circuits." Petition, p. 9.

This bold statement is entirely unwarranted. Each case involving field warehousing as well as the ordinary warehousing, presents the question of whether or not the warehouseman had posession of the goods. Each case turns upon its own facts and presents an issue of fact. In some of the cases the factual investigation by the court has led the court to the conclusion that the warehouseman did have the required possession of the goods, while in other cases, the court reached the conclusion that the warehouseman did not have the required possession of the goods.

The petitioner's statement of an alleged inconsistency of decisions, translated into simple language, means that the facts in the different cases, of course, vary with the result that the courts have reached conclusions of fact in some cases approving the warehousing arrangement and disapproving it in other cases because of plain and important differences in the factual background of the warehousing system under investigation The distinction is well illustrated by a brief consideration of two decisions of this court. There is no uncertainty about

the law. In reality, there is no difference among counsel about the law applicable to field warehousing. The only difference among counsel is with respect to the conclusions of fact. All of the lower judicial bodies have adjudged that the warehouseman did have the possession, and therefore the petition presents to this court the question of whether or not this court will undertake a review of this record to determine if the factual conclusions are correct.

A case in which this court considered field warehousing and concluded that the warehouseman had possession of the goods is:

Union Trust Co. v. Wilson, 198 *U. S.* 530.

This case was decided in 1905 in an opinion rendered by Mr. Justice Holmes. The Circuit Court of Appeals certified to this court certain questions for answer. The facts were:

> "The bankrupt, Flanders, was a wholesale leather dealer. He walled off a part of the basement of his place of business, and let at a nominal rent to the Security Warehousing Company. There were doors to this part, with padlocks bearing the name of the company, which were kept locked, and to which the company had the only keys. The company had a key to Flanders' front door, and access to the part let to it at all hours or day or night. No one else could get such access without breaking in. There were two signs on the outside, stating, in large letters, that the premises were occupied by the company as a public warehouse. The company received leather from Flanders into this place, issuing a certificate that it had received the same on storage, subject to the order of H. L. Flanders & Co., and identifying the

leather; "said commodity to be retained on storage, and delivered only upon surrender of this receipt, properly indorsed, and payment of all charges thereon."

* * *

"If Flanders desired to remove any part of the leather, he paid the necessary sum to the trust company, was intrusted with the receipts, got the warehouse company to send a man to unlock the place of enclosure and allow the removal, indorsing on the receipt the amount delivered, if less than all, and then, as the case might be, return the receipt to the trust company or surrender it into the warehousing company's hands.

"Flanders became bankrupt, and his trustee filed a bill in the district court, alleging the storage arrangement to have been fraudulent, and claiming the leather on the ground that it always had been in the possession of Flanders, and therefore had come to the possession of the trustee.

* * *

"A bailee asserting a lien for charges has the technical possession of the goods. But it always is recognized that if the bailee of the owner, by direction of the latter, assents to becoming bailee for another, to whom the owner has sold, mortgaged, or pledged the goods, the change in the character of the bailee's holding satisfies the requirement of a change of possession to validate the sale or pledge."

This court concluded:

"But there can be no doubt on the facts as stated, without more, that the company (the warehouseman) had possession of the goods. It had them under lock and key, in a place to which it had a legal title and right of access by lease."

This court also said:

> "Where there is conscious control, the intent to exclude and the exclusion of others, with access to the place of custody as of right, there are all the elements of possession in the fullest sense."

As the warehousemen had possession of the goods, this court approved the field warehousing arrangement.

By way of contrast and to point out a case where the warehouseman did not have possession of the goods, with the result that the receipts and warehousing arrangement were struck down, we invite attention to another decision of this court.

Security Warehousing Co. v. Hand, 206 *U. S.* 415.

The Referee took the proof and concluded that the warehouseman did not have the requisite possession of the goods. This conclusion was affirmed by the district and appellate courts, and was likewise affirmed by this court.

This court's opinion directs the reader to the opinion of the Circuit Court of Appeals, 143 Fed. 32, for a statement of the case. Before taking up the opinion rendered by this court, we direct attention to the facts appearing in the Circuit Court of Appeals' opinion.

The Racine Knitting Company, the bankrupt, leased to the warehouseman certain space and rooms on the first and second floors of the premises of the bankrupt.

The Circuit Court of Appeals described the condition in the following language:

> "At Stevens Point the inclosure was in the knitting company's own warehouse, which was openly occupied and used by it after the lease as well as before. No signs on the building or on the door leading into it announced the presence of the security company. The inclosure in one corner of the building was of slats, between which the packages of goods inside could be seen. No signs regarding the security company's possession were placed on the outside of the inclosure in 1901 nor at any time until in September, 1903, very shortly before the bankruptcy proceedings were begun, when the district manager of the security company came from Chicago, and changed a sign from inside, over the door, to outside, on the door. The signs inside were ambiguous, in that they referred to bins and chutes, and much of the time were not to be seen on account of the piled-up goods. The security company's agent, on the ground to maintain an open, unequivocal and exclusive possession, was the cashier of the knitting company, who had charge of the stock and of shipping. The key to the inclosure was kept on a ring with other keys used in the business of the knitting company; and this bunch of keys was accessible to the manager of the knitting company, and was left at the office during the cashier's absences. Substantially the same conditions obtained at Racine.
>
> "If a creditor desired to look over the property of the knitting company, what would be the probable result? The cashier or shipping clerk or manager could take the bunch of keys, unlock the warehouse, show the raw materials, and broken stock outside of the slatted inclosure, point out the quantity of goods within the inclosure, explain the necessity of the inclosure to prevent pilfering of the hosiery, etc., when the warehouse was open; and nothing would

> warn the creditor of the deception. And the evidence satisfies us that at least one creditor was so deceived."

Now, turning to the opinion of this court rendered by Mr. Justice Peckham, some of the interesting remarks of this court are:

> "The findings show that the receipts of the warehousing company were not entitled to the status of negotiable instruments, the transfer of which operates as a delivery of the property mentioned in them."

In the case at bar the receipts are negotiable, and there is no dispute about this.

This court also said in *Security Warehousing Co. v. Hand*:

> "There was scarcely a semblance of an attempt at such change of possession from the hands of the knitting company to the hands of the warehousing company."

In the case at bar there is not the slightest doubt that the National Cottonseed Products Corporation surrendered to the warehouseman, and without the slightest reservation, the seed houses and the cottonseed stored therein.

This court further said in *Security Warehousing Co. v. Hand*:

> "The alleged change was a mere pretense, a sham."

In the case at bar the change was realistic and the warehousing arrangement was a genuine and bona fide one as distinguished from a sham, and as shown by the concurrent opinions of the courts below.

In *Security Warehousing Co. v. Hand,* this court further stated:

> "No signs were displayed to the passer-by."

The record in this present appeal shows without dispute that the warehouseman placed and maintained at all times on the seed houses large, prominent signs visible to passers-by, that the warehouseman was in possession of the seed houses and contents.

This court concluded that the warehouseman in *Security Warehousing Co. v. Hand* did not have the requisite possession, that the warehousing arrangement was a fiction and without reality, and therefore struck down the warehouse receipts and the alleged warehousing arrangement.

This court stated:

> "The actual transactions in the case at bar differ radically from the facts as stated in Union Trust Co. v. Wilson, supra. The court there held that there was sufficient proof to show a change of possession," etc.

There is a vast and important difference between the facts in Union Trust Co. v. Wilson, where the warehouseman had possession, and the facts in Security Warehousing Co. v. Hand, where the warehouseman did not have possession. We respectfully submit that in the case at bar, the lower courts had an overwhelming and convincing amount of proof to sustain the conclusion that the Nashville Warehouse & Elevator Corporation did have the actual, open and notorious possession of the seed houses and contents, with the result that the receipts issued against the seed were and are valid.

THE WAREHOUSEMAN'S DUTIES.

On page 16 of the petition a misleading and unwarranted statement is made:

> "In the fall of 1934 the warehouse company required of the bankrupt a written agreement expressly relieving the warehouse company of every duty of a warehouseman."

Citation of the record is a sufficient answer to this extreme and unwarranted statement. The Master (T. 344) states:

> "That cottonseed has a tendency to heat and thereby spoil and it is the safer course to crush them as promptly as possible."

He then explains the reason for the contract of November 27, 1934, between the corporation and the warehouseman, and points out that the contract was intended to relieve the warehouseman from risk or liability because of the seed heating, etc.

> "On November 27, 1934, National and the Warehouse Company entered into a written agreement (Exh. 33) by which it was provided that the storing of cottonseed was hazardous and the Warehouse Company did not desire to take the risk of deterioration of the seed and obligated the National to protect the Warehouse Company against any loss, cost or damage arising from the storage of said seed except for the wilful neglect or default of the Warehouse Company, it obligated the National to inspect the seed at convenient intervals for the purpose of ascertaining the said seed was in good condition and not deteriorating or becoming less valuable and to pay for all deterioration for which the Warehouse Company may be liable; to ascertain any shrinkage in

> weight which may be occasioned by storage and in the event of any such shortage to make the same good by delivery of necessary seed or pay the value in cash." Tr. 345.

It is not unusual for a warehouseman to contract against liability for damage or loss resulting from fire, act of God, or inherent qualities of the goods stored.

In *Union Trust Co. v. Wilson,* supra, this court pointed out and approved the contractual arrangement between the bailor and the warehouseman relieving the warehouseman from liability in the event of certain contingencies. This court stated:

> "The company (warehouseman) stipulated in the receipt aginst liability for damage by fire, water, etc., and by a general contract with Flanders, the latter assumed all risk of loss except from dishonesty of the company's servants."

In view of our undisputed record and the common practice of warehousemen in such matters, is it a fair statement for the petitioner to assure this court that the contract of 1934 expressly relieved "the warehouse company of every duty of a warehouseman"? The petition contains many other equally extravagant and extreme statements, but reasonable limits for this response will not permit us to deal with each in detail.

Another illustration of the somewhat erroneous statements appearing in the petition is the following:

> "Although the warehouse receipts (conforming on their face to the requirements of the Negotiable Warehouse Receipts Act) designated the quantity called for by the receipt, the town and state in which

> the seed or products was located, and the warehouse number—the banks, the bankrupt and the warehouseman utterly disregarded all this and after this litigation started, claimed that they had an agreement whereby warehouse receipts could be outstanding and held as collateral calling for seed or products at a specified mill, when in fact there were no seed or products there, provided there was excess seed or products at some other mill in some other town, or in some other state." Petition, p. 21.

The plain implication of the above is that after the litigation started, the warehouseman and the banks trumped up some understanding which had not theretofore existed in fact. Such was not the case. The arrangement and the understanding prior to the litigation was so notorious that even the Trustee and his counsel knew of it with the result that they stipulated before the Master that it in fact had existed and was commonly known. The Master's report contains the following:

> "It was stipulated at the hearing that at different times and at particular mills there was a shortage which was taken care of by an overage at other mills, pursuant to the agreement and understanding between the parties, the Warehouse Company and the National, with the further agreement between them that any overage anywhere would be applicable to any shortage at any of the mills." Tr. 346.

THIS FIELD WAREHOUSING ARRANGEMENT AND ACTIVITY WAS IN EFFECT FOR MANY YEARS PRIOR TO THE FILING OF THE PETITION FOR REORGANIZATION AND WAS KNOWN GENERALLY TO THE TRADE.

Without elaboration, we point out that this field warehousing system now under attack was in effect for many years prior to the filing of the petition for reorganization in January, 1935, and that millions of dollars were loaned by other lending agencies such as Reconstruction Finance Corporation, Procter & Gamble, etc., against its receipts, and it was a matter of common knowledge that the National Cottonseed Products Corporation operated under a field warehousing system and borrowed money on the warehouseman's receipts. Obviously, no one could have been deceived.

The banks did, in 1934, exactly what the Reconstruction Finance Corporation had done for two prior years.

The Master's report describes the earlier history of the warehousing arrangement, and directly refutes and repels the petitioner's sinister implication that reputable warehousing companies and conservative lenders of money would have nothing to do with the receipts and the warehousing system. The petitioner's position, statements and insistence are pure fiction, and are emphatically refuted by the record.

> "The claimant Banks take the position that cottonseed is a fungible commodity, both as a matter of fact and by custom of the trade, and segregation was unnecessary and the proof is undisputed that cottonseed is so treated in the trade.
>
> "The claimant Banks take the position that field warehousing in the cottonseed oil mill trade is well

established and is being conducted substantially in accord with the system adopted by the parties on this record and introduced cottonseed oil mill operators, showing that field warehousing is extensively employed.

"The claimant Banks insist that the signs put up on the leased seed-houses were adequate to direct the attention of creditors and the public to them, were placed in conspicuous locations and could be read 200 or 300 feet away; that the signs were approved by at least five parties who had been interested in the warehousing from the time of its establishment in 1929 to the filing fo the petition in this cause; first by Procter & Gamble Company in 1929 when the Union Compress & Warehouse Company was the warehouseman; again when the Warehouse Company succeeded the Union Compress & Warehouse Company; when the Warehouse Company was acting as such for the Reconstruction Finance Corporation in 1933 and 1934 and again when the President of the National was acting on behalf of Procter & Gamble in 1929.

"It was shown that a warehousing system for the purpose of enabling oil mills to pledge cottonseed to secure advances is widespread over the country and has been for a number of years; that the Warehouse Company was engaged in that service for at least eight other Companies during the 1934-35 season; a map was exhibited showing the location in various states in the South of twenty independent oil mills using the system; it was shown that the use of field warehousing by the National continuously since 1929 *had become common knowledge in the cottonseed oil trade.*

"Claimant Banks concede on the Brief that the physical process used in running the mills continued exactly the same after the warehousing system was set up as before, and take the position that the entry into the cottonseed-houses under lease on the part

> of the National's employees for operating purposes or otherwise was entirely a permissive entry; that the Warehouse Company had control of the leased premises and that this control was recognized and respected by the officers of the National." Tr. 347, 348.

This warehousing system has had the approval of the Reconstruction Finance Corporation as well as everyone interested, including the able counsel who represented those who loaned money to the National prior to the respondents making the loans here involved. Everyone has recognized the legality of the receipts and the warehousing system other than the petitioner, who hopes to take from the banks collateral and thus profit enormously for himself and counsel at the expense of the banks which loaned the money in the utmost good faith.

CONCLUSION.

In the courts below there were a number of questions of law and fact. All are now determined except the one presented in the petition.

One of the questions below was the legality of receipts issued on products. Products from cottonseed are oil, linters, hulls, meal and cake. The courts below decided that the receipts on products were invalid as the warehouseman did not have the requisite possession of products. The question therefore was decided adversely to the banks, and the Trustee has benefited at the expense of the banks to the extent of approximately $140,000,000.

The petition refers in a number of places to the findings about products and the warehousing of products, which is to be distinguished from the warehousing of cottonseed. Such references to the findings about products are quite misleading and immaterial here.

The products were not stored in the cottonseed houses, but at other places. They were stored in and about the crushing mills and other premises of the National in no way under the control of the warehousemen. There were no signs warning the public that any products were warehoused. In fact, the warehouseman did nothing about the products and exercised no control or possession over them with the result the products receipts were declared invalid. The Master said:

> "The evidentiary facts disclose that the oil was stored in tanks, linters in houses and on platforms, hulls in houses, and meal and cake usually in the

main mill buildings; that the places where the meal and cake was stored were not separated from the other portions of the mill building by any means, nor were they tagged or marked in any manner; nor was the portion under warehouse receipt segregated from the mass on hand.

* * *

"However, whatever may be the findings on the element of possession, it is conceded on this record that prior to the institution of the present proceedings no signs giving notice of the warehousing of cottonseed products were printed and posted upon the oil tanks, the linter houses and platforms, hull houses and meal and cake storage spaces.

* * *

"The failure of notice described is suffiicient by itself, regardless of the existence of all other elements, to defeat the validity of warehouse receipts for cottonseed products and invalidity is found as a fact." Tr. 370, 371.

The banks admitted in the beginning that the products receipts were invalid as the warehouseman had no possession of the products, but endeavored to claim the products under principles of equitable liens, as the banks had loaned large sums against the product.

The Circuit Court of Appeals rejected the argument and adjudged to the Trustee the products.

This explanation is given so that the warehousing arrangement for products will not be confused with that for cottonseed. They were entirely different. The Master discusses the differences fully in his report beginning on Page 386 of the record.

We respectfully submit that the Master, the District Judge and the Circuit Court of Appeals had an abundance and overwhelming amount of evidence to sustain their concurrent conclusions that the warehouseman had the open, notorious and exclusive possession of the cottonseed, with the result that the receipts thereon are valid.

We respectfully submit that the petition for certiorari should be denied. There is no practice known to the respondents which permits a petitioner to request that this court review an issue of fact, particularly in a record so large as this, where the issue of fact has been concurrently decided and settled so emphatically in all the courts below.

Respectfully submitted,

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27

SEP 16 1941

CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

A. B. PITTMAN, TRUSTEE, NATIONAL COTTONSEED PRODUCTS CORPORATION,
Petitioner,
vs.
UNION PLANTERS NATIONAL BANK & TRUST COMPANY, ET AL,
Respondents.

No. 118.

REBUTTAL BRIEF ON BEHALF OF PETITIONER.

LOWELL W. TAYLOR,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

A. B. PITTMAN, TRUSTEE, NATIONAL COTTONSEED PRODUCTS CORPORATION,

Petitioner,

vs.

UNION PLANTERS NATIONAL BANK & TRUST COMPANY, ET AL,

Respondents.

No. 118.

REBUTTAL BRIEF ON BEHALF OF PETITIONER.

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The two reply briefs filed on behalf of the three banks do not attempt to meet and controvert the primary and evidentiary facts relied upon by petitioner. They attempt to foreclose a consideration of this case by categorical and very positive statements that the petition seeks to present for review a question of fact. This seems to be the major point of difference between petitioner and the respondents.

Let it be conceded here and now that if the petition for certiorari presents for review a question of fact, it was ill-advisedly filed and is not entitled to consideration.

Petitioner relies upon the primary and evidentiary facts found which establish that, despite all of the forms gone through, neither the warehouseman nor the banks ever had the possession of the cottonseed requisite to support a valid lien.

The major difference seems to be that petitioner regards the conclusions reached by the lower tribunals as either questions of law or mixed questions of law and fact, while the respondents, for the purpose of foreclosing the issue, insist that those conclusions are findings of fact. Before dealing specifically with this difference of opinion, we believe it well to direct attention to the rule as very recently announced by this Honorable Court in *Bogardus v. Commissioner of Internal Revenue,* 302 U.S. p. 34, 82 L. Ed., p. 32, wherein it was said:

> "The Board of Tax Appeals concluded that, from a careful consideration of the evidence, 'the payments made by Unopco to the petitioners and others were additional compensation in consideration of services rendered to Universal and were not tax-free gifts.' This, as we recently have pointed out, is 'a conclusion of law or at least a determination of a mixed question of law and fact. *It is to be distinguished from the findings of primary, evidentiary or circumstantial facts.* It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board.' Helvering v. Tex-Penn Oil Co. 300 U. S. 481, 491, 81 L. ed. 755, 762, 57 S. Ct. 569; Helvering v. Rankin, 295 U. S. 123, 131, 79 L. ed. 1343, 1349, 55 S. Ct. 732. *If the conclusion of the board be regarded*

> *as a determination of a mixed question of law and fact, it has, as we shall presently show, no support in the primary and evidentiary facts.* The ultimate determination, therefore, should be overturned, under the doctrine of Helvering v. Rankin, supra, as a matter of law." (Italics ours.) 82 L. Ed. 32, at p. 38.

This ruling was followed by the United States Circuit Court of Appeals for the Seventh Circuit in *Exmoor Country Club v. United States*, 119 F. (2) 961. In that case the Court said:

> "(1) In this case the facts are not in dispute. The problem is one of construction, i.e., the application of the taxing statute. In such situations, where the ultimate finding is a conclusion of law, or at least a determination of a mixed question of law and fact, it is subject to judicial review, and on such review the appellate court may substitute its judgment for that of the trial court. Bogardus v. Commissioner, 302 U. S. 34, 39, 58, S. Ct. 61, 82 L. Ed. 32 and Deputy et al v. Du Pont, 308 U. S. 488, 499, 60 S. Ct. 363, 84 L. Ed. 416." 119 F. (s) 961, at p. 963.

The pivotal question as presented by the briefs submitted to this Honorable Court seems to be: viz, Is the question of possession one of law, or at most, a mixed question of law and fact? If it is either, then the petition is well founded, otherwise, there is no merit in it.

It will be observed from the reply briefs filed on behalf of the respondents that all respondents have treated the conclusions reached by the lower tribunals as findings of fact, without any regard to the findings of primary or evidentiary facts found by the Master, which have never been disputed by respondents and are not now disputed by them.

The respondents say that because the lower tribunals have concluded that the taking of leases, the affixing of signs, the appointment of custodians, the requirement of bonds, the keeping of records, the issuance of receipts, the reporting by custodians at the various mills of the quantities on hand from the bankrupt's records, the keeping of records by the central control warehouseman located in Memphis, Tennessee, was sufficient to constitute "actual, open and exclusive possession" of the cottonseed, the petitioner is concluded by a finding of fact which is not subject to review in this Honorable Court.

Petitioner's insistence is that, conceding all of the evidentiary facts there enumerated to be true, the conclusion that there was an "actual, open and exclusive possession" of the cottonseed is erroneous because,—despite the existence of those facts,—the primary and evidentiary facts are, that although the leases provided for an annual rental, no rent was ever paid; although the leases provided for walling off the spaces in which warehouse products were to be stored, no spaces were ever walled off; that the custodians or so-called warehousemen were regular employees of the bankrupt, who devoted all of their time to the business of the bankrupt, except for about thirty minutes a day, when they made a report of the quantities on hand, taken from the records; that all of the custodians and the central warehouseman were paid by the bankrupt, as well as all other expenses of the warehousing arrangement, and the following additional facts found and reported by the Master:

> "The National bought, paid for and acquired the title to all cottonseed which came into its possession and stored in the seed-houses.

> Unless and until warehouse receipts were issued the National had the right to crush and use the entire seed inventory, unaffected by any provision of the warehousing agreement.
>
> Prior to the issuance of warehouse receipts the cottonseed was stored in the various seed-houses. After receipts were issued there was no change of actual possession. Operations continued exactly as before and the seed was handled exclusively by National's employees.
>
> The Warehouse Company had no employees stationed at the plants of the National who took any part in the handling of the seed from the time the seed were received and placed in the seed-houses and the products were shipped out." (Master's Rep., Vol. 2, p. 350.),

and not only was the bankrupt left in actual possession of the cottonseed, but it was understood and agreed, and the entire arrangement contemplated, that the bankrupt should crush the cottonseed to meet its daily operating requirements and sell the products in the ordinary course of its business. All this is fully set out in quotations from the Master's findings in the brief supporting the petition for certiorari.

It is petitioner's contention that this Honorable Court has already found, and it is the settled law in Tennessee, that, despite the primary facts upon which the lower tribunals have concluded that there was an "open, actual and exclusive possession" by the warehouseman (which respondents insist upon characterizing as a finding of fact), there was no such possession because all of the forms gone through were disregarded, and the primary and evidentiary facts disclose and impel the conclusion that the warehouseman never did have any possession, either open, actual or exclusive.

It will be noted that in neither brief filed by the respondents do they advert to or quote from the evidentiary facts found. In the brief filed on behalf of the Union Planters National Bank & Trust Company, et al, they quote the Master's summary, which follows his express findings, and rely upon his conclusion, viz,—

> "* * * I think that actual, open and exclusive possession of the cottonseed was had within the requirements of the decisions."

And:

> "* * * Upon consideration of all the evidentiary facts herein found and stated I am unable to view them other than that the Warehouse Company had the necessary legal possession of the cottonseed-houses, etc." Their brief, p. 9.

And they quote from the opinion of the Court of Appeals, in which the Court shows clearly that it rested upon the Master's erroneous conclusion. The quotation from the Court of Appeals' opinion says that the Master—

> "* * * concluded upon the whole record that the Warehousing Company was in actual, open and exclusive possession of the cottonseed."

The reply brief filed on behalf of the American National Bank relies upon the same conclusions found by the Master and the lower courts.

Neither brief attempts to controvert the evidentiary facts found, to which neither respondent filed exceptions.

It is petitioner's earnest insistence that since this Honorable Court has held that a lien cannot be sustained simply because a so-called field warehouseman

takes leases, appoints custodians, puts up signs, issues warehouse receipts and goes through other similar forms, while leaving the bankrupt in possession of the property, for consumption and use in his daily business, there is no finding of fact against petitioner, and that it is only necessary to apply the holding of this Honorable Court in Security Warehousing Company v. Hand, 206 U. S. 415, 27 S. Ct. 720, 51 L. Ed. 1117, to the primary and evidentiary facts found and reported by the Master and which have never been controverted by the respondents.

Respectfully submitted,

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Larry Creson

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